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Consent, Legitimacy and Elections: Implementing Popular Sovereignty Under the Lockean Constitution

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Sirs, count the votes; make strictest scrutiny,
With holy fear, lest Judgment go awry.
A vote o'er-looked may work most grievous wrong:
*A single pebble save a tottering house.***

On June 4, 1989, a young man stood in Tiananmen Square in Beijing and surveyed the array of tanks and troops deployed by the Chinese government to crush a student-led movement seeking democracy. "Our government is already done with," he remarked to an

** Aeschylus, *Eumenides*, in GREAT BOOKS OF THE WESTERN WORLD 88, lines 748-51 (R. Hutchins ed. 1952)

American journalist. "Nothing can show more clearly that it does not represent the people."[1] Events have proved the young man wrong on the first count: the Chinese government has survived essentially intact. But the truth of his second statement is more difficult to assess. When does a government truly represent its people? How can we tell?

In the United States, these questions seem to have simple answers. In the first place, we choose our government by election, so we know who represents us. In the second place, we do not have to contend with tanks enforcing the government's idea of who represents whom. Yet, many Americans would probably be surprised to learn that one of the first congressional delegates from Virginia, Francis Preston, won the election of 1794 when his brother, a federal military officer, arrived at the polls with more than sixty troops who, under orders, threatened physical violence to anyone who voted for Preston's opponent.[2] Or that an armed group seized the polls during an 1860 congressional election in Baltimore and drove off voters under a hail of bullets while the police looked the other way.[3] Or that in an 1882 congressional election in South Carolina the total number of ballots cast exceeded by six thousand the number of people who had voted.[4] Or that bribed, forged and otherwise fraudulent ballots accounted for fully ten percent of all votes cast in the November, 1982 general election in Chicago.[5] Can we be so sure that the winners of any of these elections really represented the people? If not, what is the status of officials who win election by violence or fraud, and of the government in which those officials serve?

The advent of the modern, heavily-financed, media-dependent election campaign has raised even more difficult questions. Many people, for example, think a candidate can essentially "buy" an election by outspending his or her rival on mass media advertising. If so, on what basis do we distinguish a candidate who wins an election by outspending his rival on advertising from one who bribes voters directly? Similarly, what is the status of an election in which early media projections

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1. Kristof, *Crackdown in Beijing; Troops Attack and Crush Beijing Protest; Thousands Fight Back; Scores Are Killed*, N.Y. Times, June 4, 1989, at 1, col. 6.

2. E. MORGAN, INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA 186-187 (1988).

3. H.R. MISC. DOC. NO. 4, 36th Cong., 1st Sess. 92 (1860), *quoted in* E. SIKES, STATE AND FEDERAL CORRUPT-PRACTICES LEGISLATION 36-37 (1928).

4. E. SIKES, STATE AND FEDERAL CORRUPT PRACTICES LEGISLATION 58 (1928).

5. *Voting Rights Act: Criminal Violations, Hearing Before the Subcommittee on the Constitution of the Senate Judiciary Committee*, 98th Cong., 1st Sess. 6, 17-18, 52, 55, 72-74 (1983).

of the winner cause a sizable proportion of eligible voters to stay home thinking the election is all but over?

In this Article, I shall address some of these questions in the context of the United States government by examining federal elections in light of the political theories underlying the Constitution. I shall argue that what is at stake in an election in this country is legitimacy, by which I mean rightful rule under a Lockean system of popular sovereignty. As a result, election laws and procedures necessarily affect the legitimacy of an elected government by determining the extent to which election results accurately reflect the consent of the governed. Next, I shall argue that these factors suggest that the Constitution should be read to grant Congress broad power to enact election laws aimed at enhancing electoral accuracy, and that numerous judicial decisions striking down such laws on first amendment grounds rest on an incomplete analysis of the government interests at stake.

More specifically, Part I of this Article argues that the Constitution should be understood to embody a Lockean theory of popular sovereignty. Part II argues on the basis of this theory that election laws play a significant role both in implementing popular sovereignty and in mediating governmental legitimacy by enhancing electoral accuracy. Part III examines a group of what I call "Newtonian" election laws that attempt to prevent the most basic forms of election fraud, and the favorable treatment such laws have generally received from the Supreme Court. Finally, Part IV examines recent election laws that also attempt to enhance electoral accuracy, but which have been struck down—for inadequate reasons, I will argue—on first amendment grounds.

I. THE CONSENT OF THE GOVERNED AS THE BASIS OF GOVERNMENTAL LEGITIMACY

I begin my analysis from the following premise: the legitimacy of the United States government—that is, its rule by right rather than by force—rests on the consent of the governed.

Not long ago, that premise would have required little explanation, and certainly no defense as the starting point for a work of constitutional analysis. The premise is based on the language of the Declaration of Independence: "governments . . . deriv[e] their just powers from the consent of the governed."[6] The Declaration, according to Carl

6. The Declaration of Independence para. 2 (U.S. 1776).

Becker and other prominent theorists of the first half of this century, draws directly on the political theories of John Locke.[7] Locke's theories, in turn, were thought to have provided a comprehensive rationale not only for the American Revolution, which the Declaration sought to justify, but also for the founding of a new nation. The Constitution, in this view, merely consummated the triumph of Lockean ideology by putting the ideas contained in the Declaration into a practical form, suitable for establishing and guiding a government.[8] Thus, to take the Lockean premise set forth in the preceding paragraph as the starting point for a work of constitutional analysis would have given the ensuing argument a respectable pedigree indeed.

In the last two decades, however, this formerly orthodox view of the founding has been not so much revised as hooted off the historical stage. There has been an explosion of scholarly rethinking of the ideological origins of the Revolution and its two main documents, the Declaration of Independence and the Constitution. Historians and philosophers have identified a wide variety of significant influences on the revolutionary generation that are said to stand independently alongside, or contradict entirely, the ideas of Locke. One school of thought stressing the classical republicanism of the founders has had an especially devastating impact on the central status formerly accorded to Locke in constitutional theory.[9]

These developments must give pause to anyone who wishes to argue that the Constitution can or ought to be read in any way, however limited, that smacks of Locke. Nevertheless, the results of this revisionism have not undermined in any important way the orthodox view that the United States government derives its legitimacy, in the Lockean sense, from the consent of the governed. But because the validity of a Lockean reading of the Constitution can seemingly no longer be taken for granted, I will explain why such a reading is justified in this case.

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7. C. BECKER, THE DECLARATION OF INDEPENDENCE (1922); A. MCLAUGHLIN, THE FOUNDATIONS OF AMERICAN CONSTITUTIONALISM (1961); L. HARTZ, THE LIBERAL TRADITION IN AMERICA (1955).

8. *E.g.*, A. MCLAUGHLIN, *supra* note 7, at 63-84, 103-104. Even Charles Beard, who viewed the political theories offered to justify the Constitution as little more than a thin disguise for the protection of the economic interests of the wealthy classes, characterized the political justifications for the Constitution in Lockean language. C. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 10-11 (1913).

9. *See infra* text accompanying notes 22-40.

A. The Reshaping of the Historical Landscape

1. The Identification of Multiple Influences on the Founders

The historical revisions that have undermined the former view that the founding was essentially a monolithic Lockean event may be grouped broadly, if imperfectly, into several categories. First, historians have begun to pay much greater attention, and to attribute far greater influence, to numerous philosophers of the Enlightenment era besides Locke. Students of the founding period have not only elevated the status of such traditionally acknowledged sources as Montesquieu[10] and Hume,[11] but have added to the list of philosophers whose ideas are thought to have significantly influenced the revolutionary generation such thinkers as Sidney,[12] Harrington,[13] Hutcheson,[14] Burlamaqui,[15] Blackstone,[16] Adam Smith and other figures of the Scottish Enlightenment,[17] and Isaac Newton.[18] Second, historians have devoted greater

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10. *E.g.*, Muller, *The American Framers' Debt to Montesquieu*, in THE REVIVAL OF CONSTITUTIONALISM 87 (J. Muller ed. 1988); Kesler, *The Founders and the Classics*, in THE REVIVAL OF CONSTITUTIONALISM 43, 48 (J. Muller ed. 1988); T. PANGLE, THE SPIRIT OF MODERN REPUBLICANISM 125 (1988); F. MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 66-70, 260 (1985); D. EPSTEIN, THE POLITICAL THEORY OF THE FEDERALIST 114 (1984); G. WILLS, EXPLAINING AMERICA: THE FEDERALIST 179-181 (1981) [hereinafter G. WILLS, EXPLAINING AMERICA].

11. *E.g.*, T. PANGLE, *supra* note 10, at 125; F. MCDONALD, *supra* note 10, at 66-67; *see generally* M. WHITE, PHILOSOPHY, THE FEDERALIST, AND THE CONSTITUTION (1987); G. WILLS, EXPLAINING AMERICA, *supra* note 10.

12. *See* Robbins, *Algernon Sidney's Discourses*, 4 WM. & MARY Q. 267 (1947); B. BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 34 (1967); F. MCDONALD, *supra* note 10, at 66-67.

13. *See* J. POCOCK, THE MACHIAVELLIAN MOMENT (1975) [hereinafter J. POCOCK, THE MACHIAVELLIAN MOMENT]; Pocock, *Historical Introduction*, in THE POLITICAL WORKS OF JAMES HARRINGTON (J. Pocock ed. 1977); F. MCDONALD, *supra* note 10, at 66-67; *but see* F. MCDONALD, *supra* note 10, at 75-76 n.35.

14. G. WILLS, INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE (1979) [hereinafter G. WILLS, INVENTING AMERICA]; D. EPSTEIN, *supra* note 10, at 65; F. MCDONALD, *supra* note 10, at 55.

15. M. WHITE, THE PHILOSOPHY OF THE AMERICAN REVOLUTION (1978).

16. F. MCDONALD, *supra* note 10, at 186-88, 209; West, *The Classical Spirit of the Founding*, in THE AMERICAN FOUNDING: ESSAYS ON THE FORMATION OF THE CONSTITUTION 1, 5-6 (J. Barlow, L. Levy, & K. Masugi eds. 1988).

17. *See generally* G. WILLS, INVENTING AMERICA, *supra* note 14; *but see* Hamowy, *Jefferson and the Scottish Enlightenment: A Critique of Garry Wills's Inventing America*, 36 WM. & MARY Q. 503 (1979) (critical review of Wills); K. LYNN, FALSIFYING JEFFERSON, 1978 Commentary 6 (same).

18. *See* G. WILLS, INVENTING AMERICA, *supra* note 14, at 93, 97; Commager, *America and the Enlightenment*, in THE AMERICAN FOUNDING: ESSAYS ON THE FORMATION OF THE CONSTITUTION, *supra* note 16, at 247, 248-49; *see also* C. BECKER, *supra* note 7, at 40-51. Several others

attention to the influence of Christian thought on the founding, including the role of biblical notions of covenant in Puritan and Calvinist thought.[19]

A third broad strain of recent historical reexamination focuses on the colonists' prior experience with self-government, including the lengthy pre-revolutionary experience with charters, compacts, and state constitutions.[20] A fourth result of the explosion of historical revision has been the ideological severing of the Revolution from the framing of the Constitution. Rather than regarding the framing of the Constitution as the logical consummation of the Revolution, Gordon Wood and his followers view the period between 1776 and 1787 as one of tremendous ideological ferment. As a result, these theorists regard the ideas that led to the Declaration of Independence as unreliable—indeed, misleading—indicators of the ideas contained in the Constitution.[21]

The final and most important revisionist movement, however, is associated with classical or civic republicanism. This school views the ideas of Aristotle and other classical philosophers, as filtered through the thought of Machiavelli and Harrington, among others, as equally, if not more, important an influence on the founders as the thought of Locke.

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would add Thomas Hobbes to this list of influential thinkers. *See, e.g.*, R. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 7-8 (1985); Mensch & Freeman, *A Republican Agenda for Hobbesian America?*, 41 U. FLA. L. REV. 581 (1989). But while the indirect influence of Hobbes is great, as one of the earliest and most powerful exponents of a natural law-based theory of equality and popular sovereignty, his direct influence seems to have been small, Fuller, *On Hobbes and the Character of the American Political Order*, in THE REVIVAL OF CONSTITUTIONALISM, *supra* note 10, at 69, 70 (J. Muller ed. 1988), or even negative, as one whose ideas were to be avoided. *E.g.*, E. MORGAN, *supra* note 2, at 79 n.2 (influence of Hobbes' ideas on evolution of notion of popular sovereignty lay in "simple revulsion from them").

19. *E.g.*, Kloppenberg, *The Virtues of Liberalism: Christianity, Republicanism, and Ethics in Early American Political Discourse*, 74 J. AM. HIST. 9 (1987); D. LUTZ, THE ORIGINS OF AMERICAN CONSTITUTIONALISM 24-25 (1988); Elazer, *The Political Theory of Covenant: Biblical Origins and Modern Developments*, in COVENANT, POLITY AND CONSTITUTIONALISM 3 (D. Elazer & J. Kincaid eds. 1980); *see also* A. MCLAUGHLIN, *supra* note 7, at 66-83.

20. *E.g.*, D. LUTZ, *supra* note 19; G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 232-36, 260-75 (1969); Peterson, *Thomas Jefferson, the Founders, and Constitutional Change*, in THE AMERICAN FOUNDING: ESSAYS ON THE FORMATION OF THE CONSTITUTION, *supra* note 16, at 275; E. MORGAN, *supra* note 2, at 122-47; *see also* D. LOVEJOY, THE GLORIOUS REVOLUTION IN AMERICA (1972) (describing colonial revolts that accompanied the Glorious Revolution in England).

21. G. WOOD, *supra* note 20; *but see* M. WHITE, *supra* note 11, at 208-12.

2. *The Republican Revival*

Although it appears in many variations, the republican view of the founding holds in essence that the Constitution was drafted under the influence of a loose Federalist "republican" ideology. This ideology derived in great measure from the thought and writings of the Whig or "country" parties of seventeenth- and eighteenth-century England, an ideology which itself originated in the radical ideology of the English Civil War and the Commonwealth period.[22] In varying degrees, proponents of the republican thesis view this body of thought as drawn to a significant extent from classical political philosophy.[23] Thus, ideas of corruption, civic virtue, the common good, participatory citizenship, and the like, current during the period of the American founding, can best be explained, some historians argue, within the framework of classical and Machiavellian republican thought.[24] This theory marks a radical break with the traditional Lockean orthodoxy. It suggests not only that Locke was far less influential during the founding period than previously thought, but that the founders operated under an ideology in many ways antithetical to Lockean philosophy.[25] Not surprisingly, proponents of republicanism have argued that Locke's influence on the Revolution has been highly overrated, and that our view of the founding should therefore be radically revised. While comparatively few might agree with Pocock that the Constitution ought to be seen as the "last act of the civic Renaissance,"[26] students of the founding seem to agree that the influence of classical republicanism during that period "is no longer in doubt."[27]

There are at least two reasons why students of the Constitution should hesitate to embrace wholeheartedly this so-called "republican revival." First, exponents of republicanism have been distressingly vague about its fundamental tenets. The founders' republicanism is said to have its roots in classical political thought, but that label covers an enormous amount of ground. Part of the confusion over the "protean

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22. The first influential work to make this connection was B. BAILYN, *supra* note 12.

23. The two most influential works are G. WOOD, *supra* note 20, and J. POCOCK, THE MACHIAVELLIAN MOMENT, *supra* note 13.

24. *See, e.g.*, G. WOOD, *supra* note 20, at 46-90; J. POCOCK, THE MACHIAVELLAN MOMENT, *supra* note 13, at 506-52. Many other historians have elaborated on this theme. *See generally The Creation of the American Republic, 1776-1787: A Symposium of Views and Reviews*, 44 WM. & MARY Q. 549 (1987).

25. See *infra* note 29.

26. J. POCOCK, THE MACHIAVELLIAN MOMENT, *supra* note 13, at 462.

27. Kloppenberg, *supra* note 19, at 14.

concept"[28] of republicanism undoubtedly stems both from the loose way in which the term is used, and from the failure of its advocates to identify precisely the scope of classical republican influence in the wide variety of spheres that makes up the body of political thought. For instance, do exponents of republicanism mean to suggest the existence of a classical strain in the framers' thinking concerning human nature? slavery? the origins of government? the proper objects of government? the best forms of government? the nature of law? the nature of the common good? the good life? All of these were principal preoccupations of classical political philosophy, yet it seems clear that the founders rejected many of the classical answers to these questions, if not the very questions themselves.[29]

Second, even if exponents of republicanism mean to lay claim to only a modest portion of the political thought of the founders, their claims may still be overstated. Numerous historians, writing well after the deluge of republican-inspired scholarship, continue to endorse the orthodox view that Locke was the principal influence on the political thought of the framers of America's founding documents.[30] In addition, several of the leading proponents of classical republicanism appear to

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28. Appleby, *Republicanism and Ideology*, 37 AM. Q. 461, 461 (1985).

29. To take just one example, Aristotle taught that political society originates naturally—that man is by nature a political animal, that he reaches his highest fulfillment in political life, and that the *polis* is conceptually "prior to" the individual. ARISTOTLE, ARISTOTLE'S POLITICS, Bk. I, ch. 2, at 9-12 (B. Jowett trans. 1905). The founders, in contrast, clearly held the Lockean view that, while natural conditions may well impel men toward the formation of societies, the establishment of society is nevertheless an act of reason, and that individuals are "prior to" and possess more complete sovereignty than the society or the state. *See infra* text accompanying notes 41-54. *See* T. PANGLE, *supra* note 10, at 54-56 (distinguishing classical from modern views of liberty and virtue in the political context); Kahn, *Reason and Will in the Origins of American Constitutionalism*, 98 YALE L.J. 449 (1989) (classical thinkers did not distinguish reason and will, which furnishes the basis for the framers' distinction of political legitimacy from political truth); Banning, *Jeffersonian Ideology Revisited: Liberal and Classical Ideas in the New American Republic*, 43 WM. & MARY Q. 3, 13 (1986) ("Jeffersonians were never strictly classical in their republicanism"); Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1558 (1988) (some framers manifested "a rejection of central features of traditional republicanism").

30. *E.g.*, West, *supra* note 16, at 4 ("the evidence is overwhelming that Locke was the leading authority on the principles of government for the Americans who made the Revolution"); M. WHITE, *supra* note 15, at 5 (Locke's influence "goes without saying"); *id.* at 64-65 *passim* (Locke's *Two Treatises* an "important antecedent of the Declaration's philosophical truths"); T. PANGLE, *supra* note 10, at 126 (by late eighteenth century there was a "largely Lockean consensus on political first principles"); Kesler, *supra* note 10, at 49 (ultimately even Wood, Pocock, and others agree with the "prevailing interpretation that the Constitution is a work of modern or Lockean political theory"); Lewis, *Adam Smith and the Moral Theory of Liberal Constitutionalism*, in THE REVIVAL OF CONSTITUTIONALISM, *supra* note 10, at 104 (Declaration of Independence is largely condensation of Locke).

have retreated somewhat from earlier claims.[31] Moreover, the most recent historical work seems to point toward a possible synthesis view—a "historiographical convergence" in the words of one recent commentator[32]—in which classical republicanism is thought to have played a role, but by no means a dominant role, in the founding of the United States.[33]

Unfortunately, attempts by legal scholars to draw upon the work of revisionist historians have only increased the confusion surrounding the meaning and significance of the framers' republicanism. Some commentators have defined their notion of classical or civic republicanism so broadly—for example, to include within its scope not only the classics but also Hobbes, Harrington, Locke and John Adams—as to seriously impair the usefulness and coherence of the term.[34] Others have defined it as nothing less than the Madisonian understanding of republican government, expressed in *Federalist No. 39*, of self-rule through limited government.[35] This definition, as I shall show below, suggests, if anything, an Enlightenment concept of popular sovereignty—the very strand of political thought against which republicanism is said to stand,[36] and very possibly one that is founded on fundamental assumptions inconsistent with republicanism's basic tenets.[37] Recent attempts by theorists to use republicanism as the basis for proposed reconsiderations of constitutional and legal doctrines add to the confusion by borrowing selectively from classical republican thought and employing distinctly non-classical methods of analysis and argument.[38] Some critics

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31. *See* Banning, *supra* note 29; Pocock, *Between Gog and Magog: The Republican Thesis and the Ideologia Americana*, 48 J. HIST. OF IDEAS 325, 336-346 (1987) [hereinafter Pocock, *Gog and Magog*].

32. Onuf, *Reflections on the Founding: Constitutional Historiography in Bicentennial Perspective*, 46 WM. & MARY Q. 341, 351 (1989).

33. *See* Banning, *supra* note 29.

34. Epstein, *Modern Republicanism—Or the Flight From Substance*, 97 YALE L.J. 1633, 1634 (1988).

35. Kerber, *Making Republicanism Useful*, 97 YALE L.J. 1663, 1663 (1988); Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 31, 46-47 (1985) [hereinafter Sunstein, *Interest Groups*]; *see* G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, CONSTITUTIONAL LAW 5 (1986).

36. *See* Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 17-18 (1986) (Republicanism, though "not a well-defined historical doctrine," represents a "normative political vision to set against the vision believed to have predominated in the thought of the framers and in the Constitution they framed.").

37. *See supra* note 29.

38. To give but one example, the whole republican revival can be seen as a kind of Humean enterprise. Hume rejects the natural rights-based philosophy of government propounded by Locke and others. According to Hume, the ultimate foundation of government is "opinion." D. HUME, *Of*

have thus argued that advocates of republicanism are in fact offering what amounts to "a contemporary political theory"[39] rather than a revisionist-inspired reinterpretation of the political thought underlying the Constitution.[40]

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the First Principles of Government, in HUME'S MORAL AND POLITICAL PHILOSOPHY 307 (H. Aiken ed. 1948). That is, governments obtain popular obedience on the basis of habit and acquiescence rather than from any right-laden act of sovereign consent, although Hume concedes that occasionally governments are founded on actual consent. D. HUME, *Of the Original Contract*, in HUME'S MORAL AND POLITICAL PHILOSOPHY 356, 358 (H. Aiken ed. 1948). Consequently, a Humean inquiry would ask the question: what justification for the existence of the government is necessary to capture the opinion—and hence obedience—of the people? Max Weber developed this concept in the sociological context with the idea of "legitimacy." For Weber, a social order is "legitimate" when it commands popular belief that obedience is obligatory. 1 M. WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY 31-38 (1968); *see generally id.* at 212-301. *But see* Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 WIS. L. REV. 379 (Weberian concepts fail to explain public obedience to law).

In many respects, the republican movement can be explained as a rejection of the traditional Lockean explanation for the continued rightfulness of governmental claims to obedience, which rests, for generations subsequent to the founding generation, on tacit consent expressed in most cases by continued residence in the state exercising jurisdiction. *See infra* note 54. Proponents of republicanism seem to be searching cautiously for some foundation on which to base a Humean opinion (or Weberian belief) that would justify personal or generational obedience to a government that claims to rest on principles with which advocates of republicanism seem dissatisfied. *See, e.g.*, Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1566-71 (1988) (articulating a version of "liberal republicanism"). The new republicans thus have much in common with democracy theorists such as Alexander Bickel and John Hart Ely who have sought to understand the institution of judicial review in distinctly non-Lockean terms. *See* A. BICKEL, THE LEAST DANGEROUS BRANCH (1962); J. ELY, DEMOCRACY AND DISTRUST (1980); *cf.* Griffin, *What is Constitutional Theory? The Newer Theory and the Decline of the Learned Tradition*, 62 S. CAL. L. REV. 493 (1989).

39. Powell, *Reviving Republicanism*, 97 YALE L.J. 1703, 1707 (1988).

40. One often gets the impression that proponents of republicanism are stretching to find evidence to support their view. For example, Sunstein has argued that the federal due process requirement of rationality emerges from republican preferences for deliberation and for justification of actions by reference to the common good. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984); Sunstein, *Interest Groups*, *supra* note 35, at 29. But one could just as easily, and in my view more plausibly, describe rational basis review as rooted in Lockean notions of the illegitimacy of arbitrary government, which Locke viewed as a form of political slavery forbidden by natural law. *See* J. LOCKE, THE SECOND TREATISE OF GOVERNMENT §§ 17, 22-24, 135-137, 159-168, at 14-15, 17-18, 70-73, 83-88 (C. Macpherson ed. 1980) (1690) [hereinafter J. LOCKE, THE SECOND TREATISE]; *see also* Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987) (founders did not intend Constitution to displace natural law). Indeed, the rationality requirement developed to protect citizens from governmental actions thought to be "arbitrary and capricious." *See, e.g.*, Dent v. West Virginia, 129 U.S. 114, 123-124 (1889) (concept of due process derived from English doctrine designed to secure individuals from arbitrary actions of the king); Pacific States Box & Basket Co. v. White, 296 U.S. 176 (1935) (applying arbitrary and capricious standard of review to fourteenth amendment due process claim). For a recent critique of the republicanism advanced by legal academics, see Sandalow, *A Skeptical Look at Contemporary Republicanism*, 41 FLA. L. REV. 523 (1989).

While these difficulties tend to undermine the force of the grandest claims on behalf of the framers' republicanism, they fall far short of rescuing Locke from the wings of the founding drama. There can be little doubt that republican thought played some role in the founding—the question is what role it played, and with respect to what aspects of the constitutional plan. At best, the relative influence of Enlightenment Lockeanism and classical republicanism on the founding remains murky. It would be impossible here to attempt any kind of comprehensive constitutional integration of these different strands of thought, and it is not my purpose to do so. Nevertheless, I shall offer what I consider an exceedingly modest and uncontroversial proposal, although one which could potentially serve as a point of reference for future thinking about the more difficult aspects of resolving Lockean and republican influences on the Constitution. My proposal is this: first, whatever else it may encompass, the Constitution reflects a theory of popular sovereignty in which governmental legitimacy is based on the consent of the governed; second, this theory is essentially Lockean.

B. Popular Sovereignty and the Consent of the Governed

1. Some Basics of Lockean Theory

Before turning to the reasons why I believe the Constitution is based on a Lockean theory of popular sovereignty, I would like to state explicitly my conception of that theory. I also wish to address in what sense I consider the theory of popular sovereignty expressed in the Constitution to be Lockean. To take the second problem first, I must confess to some misgivings about the use of the term "Lockean." Although the theory of popular sovereignty set forth below is found in the pages of Locke's *Second Treatise*, very similar ideas or traces of such ideas are also found in works by a great many seventeenth- and eighteenth-century philosophers including such diverse thinkers as Hobbes, Sidney, Hutcheson, Burlamaqui,[41] and even Grotius, Pufendorf and, to a certain extent, Blackstone,[42] not to mention popularizers such as the pam-

41. *See* T. HOBBES, LEVIATHAN (J. Plamenatz ed. 1963) (1651); A. SIDNEY, DISCOURSES CONCERNING GOVERNMENT (1698); F. HUTCHESON, A SYSTEM OF MORAL PHILOSOPHY (A. Kelley ed. 1968) (1755); J. BURLAMAQUI, THE PRINCIPLES OF NATURAL AND POLITIC LAW (T: Nugent trans. 1748) (Philadelphia 7th ed. 1832).

42. H. GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES, Bk. I, ch.3, § 8, at 103-106, Bk. II, ch.5, § 17, at 249, Bk. II, ch.6, §§ 3-4, at 260-62, Bk. II, ch.7, § 14, at 281, Bk. II, ch.7, § 27, at 289-90 (F. Kelsey trans. 1925) (1646); S. PUFENDORF, DE JURE NATURAE ET GENTIUM LIBRI OCTO (C. Oldfather & W. Oldfather trans. 1934) (1688). 1 W. BLACKSTONE, COMMENTARIES ON

phleteer Thomas Paine.[43] Because various historians have argued that one or another of these thinkers had a greater influence on the founders than the orthodox Lockean view admits, to call the constitutional theory of popular sovereignty "Lockean" may be a bit misleading.

Despite these misgivings, I shall describe the ideas below as "Lockean" for three reasons. First, other words seem to have just as much or more potential to mislead.[44] Second, there is at least some historical evidence that Locke was the source, if not directly then indirectly, of the framers' notions of popular sovereignty.[45] Third, Locke is often considered to be the most articulate exponent of these ideas, which were so commonplace by 1776 as to be considered "the common sense of the matter."[46] I shall, however, give parallel citations, where appropriate, to thinkers other than Locke who have advanced substantially similar ideas.

The relevant aspects of Locke's theory of government are as follows. Locke takes the state of nature as his starting point, and argues that autonomous individuals, self-ruling as a matter of natural law, vol-

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THE LAWS OF ENGLAND, Bk. I, § 2, at 38-41 (rep. ed. 1966) (1765).

43. *See* T. PAINE, COMMON SENSE 65-68 (I. Kramnick ed. 1984) (1776).

44. I have tried on for size and rejected a number of alternatives. "Enlightenment" captures the sense of widespread acceptance of the theory of popular sovereignty during and preceding the founding period, but also captures a vast array of other ideas that go far beyond popular sovereignty; it thus suffers from the same defects of vagueness as "classical republicanism." "Rationalist" successfully broadens the focus from Locke to others of his stripe, but suggests an emphasis on rationalist epistemology, which is not essential to the constitutional theory of popular sovereignty. *See* M. WHITE, *supra* note 11 (describing epistemological eclecticism of the framers). "Contractarian" is good insofar as it focuses on a much narrower aspect of Lockean thought than the broad term "Lockean" suggests. A contractarian focus, however, is too narrow because it stops a bit short of gathering in the concept of government by consent, which is critical to the analysis I pursue below. In addition, the term masks a good deal of diversity of thought. *See generally* M. THOMPSON, IDEAS OF CONTRACT IN ENGLISH POLITICAL THOUGHT IN THE AGE OF JOHN LOCKE (1987). "Constitutionalist" picks up what "contractarian" omits, but carries far too much additional baggage to be useful. *See* D. LUTZ, *supra* note 19, at 24-25 (describing variety of sources of constitutionalism). The neologism "sovereigntist" focuses properly on the idea of sovereignty, but gives no clue as to what type of sovereignty is meant. "Popular sovereigntist" would be just right if it were not so cumbersome and ugly. I invite suggestions.

45. See *infra* notes 62-64 and accompanying text.

46. Letter from Thomas Jefferson to Henry Lee (May 8, 1825), *reprinted in* THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 719 (A. Koch & W. Peden 1st ed. 1944).

Carl Becker has suggested that Locke's influence was magnified by the fact that "men are influenced by books which clarify their own thought, which express their own notions well, or which suggest to them ideas which their minds are already predisposed to accept." C. BECKER, *supra* note 7, at 28. *See also* D. LUTZ, *supra* note 19, at 114 (Americans "fastened upon [Locke's] clear, efficient vocabulary for expressing what they had already been doing for years"); West, *supra* note 16, at 30 (government by consent of the governed is "the Lockean principle").

untarily agree to band together into a civil society for their own mutual security and advantage.[47] As a central feature of this transaction, each member of the society surrenders his natural right of self-rule to the collective society. This exchange usually, although not always, results in a binding agreement to abide by the will of the majority of the society's members.[48]

Having entered into a self-governing society, society's members, also known as "the people," generally find it advantageous to create a government to handle the chores associated with collective self-rule. The creation of a government, though largely a matter left to the people's discretion, involves at a minimum the appointment of a legislator to make laws binding on all members of society.[49] The government,

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47. J. LOCKE, THE SECOND TREATISE, *supra* note 40, §§ 4, 87, 89 at 6, 46-48. *Cf.* T. HOBBES, *supra* note 41, ch. 13, at 141-43 (men naturally equal; state of nature is state of war); A. SIDNEY, *supra* note 41, at 60 (families join into "one civil Body . . . [for] convenience, safety and defence"; this was "a collation of every man's private Right into a Public Stock"); *id.* at 22-23; F. HUTCHESON, *supra* note 41, at 281 ("the first state constituted by nature itself"); *id.* at 3:4, 212-14 ("dangers or miseries attending a state of anarchy" exceed "inconveniences" of submitting "with others" to rule of governors); J. BURLAMAQUI, *supra* note 41, Bk. II, ch.5, § 17, at 26-27 (in "primitive and original state . . . every man is naturally master of himself"), at 13 ("civil society is nothing more than the union of a multitude of people"); H. GROTIUS, *supra* note 42, at 249 ("public associations" formed by "a people or by peoples"); S. PUFENDORF, *supra* note 42, at 974 (first step to establishing state is "to enter into an agreement, every individual with every other one, that they are desirous of entering into a single and perpetual group"); J. MILTON, TENURE OF KINGS AND MAGISTRATES 9 (W. Allison ed. 1911) (1649) (men born free, make mutual agreement for security); 1 W. BLACKSTONE, *supra* note 42, (discussing natural liberty subject to natural law); *see also* E. Vattel, *The Law of Nations*, in CLASSICS OF INTERNATIONAL LAW, Vol. III, Book I, ch. 1 (G. Fenwick trans. 1916) (1758).

48. J. LOCKE, THE SECOND TREATISE, *supra* note 40, §§ 87, 89, 95-99, at 46-48, 52-53. *Cf.* T. HOBBES, *supra* note 41, at 176 (government arises when individuals give up right of governing to one or assembly, provided all others do the same); *id.* ch. 18, at 180 (majority will controls); A. SIDNEY, *supra* note 41, at 23 (basis of all government is relinquishment by all men of "the Right which they had of governing themselves"); F. HUTCHESON, *supra* note 41, at 227 (governments always started by mutual agreement of people to unite and be governed in common); H. GROTIUS, *supra* note 42, at 261 (states formed by "voluntary compact"); 1 W. BLACKSTONE, *supra* note 42, Bk. I § 2, at 41-43 ("every man, when he enters into society, gives up a part of his natural liberty . . . and obliges himself to conform to [society's] laws"); *see also* E. VATTEL, *supra* note 47.

49. J. LOCKE, THE SECOND TREATISE, *supra* note 40, §§ 132, 134, at 68-70. *Cf.* T. HOBBES, *supra* note 41, at 245 ("The legislator in all commonwealths is only the sovereign"); F. HUTCHESON, *supra* note 41, at 227 (governments created by decree by people "of the form or plan of power, and of the persons to be intrusted with it"); *id.* at 234-35 (in any government, power to make laws must be conveyed); J. BURLAMAQUI, *supra* note 41, at 24, 27 (people "confer[] the supreme authority" on governors; need "decree for settling the form of government"); *id.* at 30 (sovereignty reduces many will to one "by means of a plurality of suffrages"); H. GROTIUS, *supra* note 42, Bk. I, ch.3, § 8, at 104 (people have right to select form of government they wish); S. PUFENDORF, *supra* note 42, at 974 (necessary to decide on form of government and give consent to it).

Locke argues, is thus no more than an agent of the people: it exercises only the powers that have been delegated by the people, and it exercises them then only in a way that the people have authorized.[50]

A government duly appointed by the people and acting within the bounds of its delegated powers is "legitimate"—that is, it has the right, and not merely the power, to make laws binding on society. Conversely, a government that has not been appointed by the people, or that exceeds the scope of its delegated powers—i.e., that exists or acts without the consent of the governed—is not legitimate. It and its members are "usurpers," and its laws void.[51] The people have the right to resist the usurping government and to replace it with one of their choice.[52]

It is the ideas outlined above to which I refer when I refer to the Lockean theory of popular sovereignty,[53] and to governmental legitimacy based on the consent of the governed.[54] I characterize Locke's

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50. J. LOCKE, THE SECOND TREATISE, *supra* note 40, §§ 134-42, at 69-75. *Cf.* A. SIDNEY, *supra* note 41, at 93-94 ("every People for themselves forms and measures the Magistracy, and magistratical Power; which . . . hath its exercises and extent proportionable to the Command of those that institute it"); *id.* at 54, 76; F. HUTCHESON, *supra* note 41, at 236 (governors hold power "in that extent which the original constitution or the fundamental laws have appointed"); *id.* at 266 (same); J. BURLAMAQUI, *supra* note 41, at 45 (people grant sovereigns only limited authority); J. MILTON, *supra* note 47, at 12 (power of rulers derived from people).

51. J. LOCKE, THE SECOND TREATISE, *supra* note 40, §§ 197-198, at 100-01. *Cf.* F. HUTCHESON, *supra* note 41, at 270 (usurper exercises "powers not vested in him by the Constitution"); J. BURLAMAQUI, *supra* note 41, at 30 (government "ceases to be a legitimate authority" when uses powers for private rather than people's benefit).

52. J. LOCKE, THE SECOND TREATISE, *supra* note 40, § 243, at 123. *Cf.* A. SIDNEY, *supra* note 41, at 247-48 (people can depose their rulers); F. HUTCHESON, *supra* note 41, at 270 (people have right of resisting usurper); J. BURLAMAQUI, *supra* note 41, at 92 (people may depose tyrants); J. MILTON, *supra* note 47, at 15 (people have right to choose or change own government).

53. Locke, of course, pursues those basic premises further, in many cases arriving at quite different conclusions from thinkers whose ideas parallel his. For example, Locke maintains that the people's delegation of sovereign power is always revocable whenever the people wish to revoke it. J. LOCKE, THE SECOND TREATISE, *supra* note 40, §§ 149, 222, at 77, 111. Hobbes, on the other hand, whose ideas on the state of nature and the origins of society and government are very similar to, and probably to a certain extent inspired, Locke's theory of popular sovereignty, *see* T. HOBBES, *supra* note 41, ch. 13-17, at 141-86, holds that the people's delegation of power to the monarch is irrevocable. *Id.* ch. 18.

54. Despite the prominent role played by popular consent in his political philosophy, Locke is far from clear about just what types of actions or situations constitute the types of consent necessary to confer governmental legitimacy. On the one hand, he seems to contemplate a type of deliberately and voluntarily chosen state of mind on the part of one person toward the exercise of authority by another. *See* J. LOCKE, THE SECOND TREATISE, *supra* note 40, §§ 95-98, 122, 134, 140-141, 149-154, 173, at 52-53, 65, 69, 74-75, 77-80, 90; *cf.* A. SIDNEY, *supra* note 41, at 84 (" 'Tis not therefore the bear sufferance of Government when a disgust is declared, nor a silent submission when the power of opposing is wanted, that can imply an Assent . . . but an explicit act of approbation, when men have ability and courage to resist or deny"). This is what we might expect given the general outlines of Locke's epistemology. *See, e.g.*, J. LOCKE, ESSAY CONCERN-

theory as one of popular sovereignty because, in Locke's scheme, ulti-

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ING HUMAN UNDERSTANDING (A. Woozley ed. 1964) (1690), Bk. II, ch. 1 [hereinafter J. LOCKE, ESSAY CONCERNING HUMAN UNDERSTANDING] (ideas formulated by reflection). On the other hand, Locke also invokes, particularly with respect to individuals who are not among the original constituters of a society, a notion of "tacit" consent in which any action taking advantage of the benefits conferred by a society or its laws is held to constitute consent sufficient to confer legitimacy. J. LOCKE, THE SECOND TREATISE, *supra* note 40, §§ 119-121, at 63-65. This tacit consent apparently occurs regardless of the state of mind of the actor; indeed, the word "consent" is misleading when applied in these situations, because what Locke seems to contemplate is a scheme in which, for reasons quite apart from the actor's mental state, consent or its equivalent may properly be deemed to have occurred.

The Lockean notion of consent has been criticized in at least three ways. First, it has been criticized simply for its vagueness—John Dunn, for example, has called Locke's failure adequately to explain consent "a damaging lacuna" in his theory. Dunn, *Consent in the Political Theory of John Locke*, in LIFE, LIBERTY AND PROPERTY: ESSAYS ON LOCKE'S POLITICAL IDEAS 129, 143 (G. Schochet ed. 1971). Others have noted that Locke and Lockean consent theorists employ the notion of consent in a way that glosses over great complexities both in the range of subjective states of mind that the term may be taken to embrace, *see* P. PARTRIDGE, CONSENT AND CONSENSUS 32-39 (1971) (essentially "deconstructing" the notion of consent and showing that its possible meanings range from acquiescence under duress to active permission and explicit approval), and in the aspects of political obligation to which it may apply. *See* Pitkin, *Obligation and Consent—I*, 59 AM. POL. SCI. REV. 990 (1965) (consent relevant to very distinct questions ranging from the conditions under which resistance to authority is justified, to the questions of who must be obeyed and why); *see also* J. PLAMENATZ, CONSENT, FREEDOM AND POLITICAL OBLIGATION 1-25 (2d ed. 1968); Gewirth, *Political Justice*, in SOCIAL JUSTICE 128-41 (R. Brandt ed. 1962).

Second, Locke's notion of consent has been attacked on the ground that it is simply unreflective of reality—that governments are not and never have been founded on anything like the explicit or even tacit consent seemingly required by Lockean theory. *See* D. Hume, *Of the Original Contract, Of the First Principles of Government, and Of the Origin of Government*, in DAVID HUME, MORAL AND POLITICAL PHILOSOPHY 307, 311, 356 (H. Aiken ed. 1948).

Third, and perhaps most significantly, the Lockean notion of consent has been criticized as being not meaningful, or as meaning something quite different from what Lockean consent theorists seem to have intended. Thus Pitkin argues that Locke's theory of consent makes sense only when applied to "the hypothetical consent imputed to hypothetical, timeless, abstract, rational men," Pitkin, *supra*, at 997, and that government is legitimate not when it is founded on actual consent, but when it is, by its nature and actions, "government which *deserves* consent." *Id.* at 999 (emphasis in original). The rejection of the notion of actual, particularized consent in favor of a conception of hypothetical, particularized consent forms the centerpiece of Rawls' theory of justice, and allows him to recast the Lockean contract theory of political obligation in purely moral terms. J. RAWLS, A THEORY OF JUSTICE (1971). *Cf.* J. BUCHANAN & G. TULLOCK, THE CALCULUS OF CONSENT (1962) (using economic analysis to deduce a structure of government similar to that deduced by Rawls). For further elaboration of the conceptual intertwining of moral and political obligation under the rubric of "consent," see J. STEINBERG, LOCKE, ROUSSEAU, AND THE IDEA OF CONSENT: AN INQUIRY INTO THE LIBERAL-DEMOCRATIC THEORY OF POLITICAL OBLIGATION (1978), and sources cited therein.

Others have staked out a more extreme position. Dunn seems to deny that the Lockean notion of consent has any fixed content even hypothetically, and argues that "the consent of men . . . is merely the mode in which political authority acquires such legitimacy as it has." Dunn, *supra*, at 161. Although Dunn views Locke as anchoring the concept of legitimacy ultimately in divine judgment, *id.* at 160-61, others view this explanation of consent as inadequate. Casinelli, for ex-

mate *rightful* power rests with the people of a society and not with their government. I characterize Locke's theory as one in which legitimacy is based on consent because the government derives its right to rule *exclusively* from the people, and because its rule is rightful only for so long and in such fashion as the people desire. These aspects of Lockean thought are reflected in the Constitution.

2. *The Constitution and the Lockean Theory of Popular Sovereignty*

Any attempt to read the Constitution as embodying a particular political theory runs the inevitable risk of Procrustean distortion of either the document or the theory. I hope to lessen this risk by making what I again stress are modest claims. I do not argue that the Constitution is Lockean in that it incorporates in every detail the entire corpus of Locke's political writings. Rather, I contend only that one aspect of the Constitution, albeit a potentially important one, reflects the broad outlines of Locke's theory of popular sovereignty. Furthermore, I argue neither that this view of the Constitution is the only correct one, nor that it is relevant to every constitutional problem. On the contrary, I argue only that it provides a useful framework for resolving some varieties of constitutional problems, and, in particular, problems concerning the regulation of federal elections.

With that caveat in mind, let us turn to the evidence.

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ample, argues that "a government which is by the consent of the governed cannot be distinguished from one which is not." Casinelli, *The "Consent" of the Governed*, 12 W. POL. Q. 391, 405 (1959). He thus advocates a view of governmental legitimacy that is ultimately Weberian. *See* M. WEBER, *supra* note 38, at 31-38 (government is "legitimate" when people believe they must obey it). Such critics follow a path of analysis that seems to lead to the conclusion that there is no respectable difference between the political philosophies of Locke and Hume.

Returning to the problem at hand, there is no evidence that the founders were aware of any of these criticisms of the Lockean idea of consent besides that of Hume, or that Hume's or any other person's criticism of consent theory caused them the slightest discomfort. Indeed, the fact that the founders were engaged in the process of defining, establishing and deliberating about their society and its government suggests strongly that they must have viewed the theory of consent even in its strongest forms as a highly accurate description of the world. *Cf.* E. MORGAN, *supra* note 2, at 174 ("In elections the fiction of popular sovereignty makes its strongest approach to reality, as actual people ostensibly go about selecting from among themselves the few to whose government they consent."); Comment, *Protecting the Rationality of Electoral Outcomes: A Challenge to First Amendment Doctrine*, 51 U. CHI. L. REV. 892, 894-95 & nn.17-22 (1984) [hereinafter Comment, *Electoral Outcomes*] (discussing framers' belief that elections should and could express rational decisions of the people). For the founders, the creation of the nation and the adoption of the Constitution was, in Hamilton's words, the establishment of "good government from reflection and choice," THE FEDERALIST No. 1, at 33 (A. Hamilton) (C. Rossiter ed. 1961).

a. Textual Evidence

The Declaration of Independence states:

> We hold these truths to be self evident; that all men are . . . endowed by their creator with certain unalienable rights . . .; that to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness.[55]

In this passage, the Declaration moves from natural liberty, to the consensual establishment of legitimate government, to the residual right to change the government. Whatever revisionists may say, these words clearly and succinctly express a theory of popular sovereignty and of governmental legitimacy based on popular consent, a theory that is Lockean as I have defined that term.

Now, the extent to which Locke was *in fact* Jefferson's source for these ideas is a subject of dispute among historians. On the one hand, revisionists have claimed that Locke's influence has been "wildly distorted";[56] that the Lockean orthodoxy is a "cliche,"[57] or is "anachronistic";[58] that Locke's theory of the social contract had "little relevance" before 1776;[59] and that Jefferson drew in the Declaration on thinkers who "stood at a conscious and deliberate distance from Locke's political principles."[60] On the other hand, more recent "counterrevisionists" affirm the role of Locke. Forrest McDonald, for example, has recently said: "[the view] [t]hat the central argument of the Declaration is based mainly upon Locke's *Second Treatise* is indisputable."[61] This type of disagreement is partly the result of an ambiguous historical record. To take just one example, shortly after Jefferson drafted the Declaration, Richard Henry Lee accused him of cribbing the Declaration straight from Locke.[62] Jefferson later wrote a denial in which he claimed to rely on no single author, but nevertheless listed Locke as a

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55. The Declaration of Independence para. 2 (U.S. 1776).

56. J. POCOCK, THE MACHIAVELLIAN MOMENT, *supra* note 13, at 424.

57. Dunn, *The Politics of Locke in England and America in the Eighteenth Century*, in JOHN LOCKE: PROBLEMS AND PERSPECTIVES 45-46 (J. Yolton ed. 1969).

58. D. LUTZ, *supra* note 19, at 11.

59. G. WOOD, *supra* note 20, at 283.

60. G. WILLS, INVENTING AMERICA, *supra* note 14, at 239.

61. F. MCDONALD, *supra* note 10, at ix.

62. C. BECKER, *supra* note 7, at 25.

relevant source—yet listed him third, after Aristotle and Cicero.[63] The extent to which Jefferson actually relied consciously on Locke is thus something of a mystery.[64]

I do not argue, however, that the Declaration is necessarily *derived* from Locke, but that it is *Lockean* in its theory of popular sovereignty and consent. The Declaration's preamble, and in particular its assertion that governments derive their "just powers from the consent of the governed," strongly ally the document with such Lockean ideas.

The Constitution can be analyzed similarly.[65] "We the People of the United States of America," it begins, "do hereby ordain and establish this Constitution."[66] This language suggests a Lockean theory of popular sovereignty in at least three ways. First, the language not only refers immediately and prominently to "the People," an entity of great significance in Lockean theory,[67] but also identifies the Constitution as

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63. Letter from Thomas Jefferson to Henry Lee (May 8, 1825), *reprinted in* THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 719 (A. Koch & W. Peden 1st ed. 1944). The full passage is:

> Neither aiming at originality of principle or sentiment, nor yet copied from any particular and previous writing, [the Declaration] was intended to be an expression of the American mind, and to give to that expression the proper tone and spirit called for by the occasion. All its authority rests then on the harmonizing sentiments of the day, whether expressed in conversation, in letters, printed essays, or in the elementary books of public right, as Aristotle, Cicero, Locke, Sidney, etc.

Id. I do not know whether any of the scholars who have attempted to interpret this passage have noted that the thinkers are listed in alphabetical order; perhaps Jefferson did not intend to list them in order of influence.

64. *See* Hamowy, *supra* note 17, at 512-14 (brief overview of the evidence supporting the view that Jefferson admired and relied on Locke).

65. As mentioned earlier, Wood and his followers have described the period between the Revolution and the ratification of the Constitution as one of great change and ferment, thereby undermining the otherwise natural inference that the Declaration points the way toward or sheds any useful light on the Constitution. G. WOOD, *supra* note 20, at 232-36. While Wood's work thus highlights the dangers of attempting to illuminate the Constitution by reference to the Declaration, the particular danger he emphasized is not present here. To oversimplify somewhat, Wood viewed the period of 1776 to 1787 as one in which classical republicanism was displaced by Lockean liberalism. *Id.* at 519-32. Since Wood would presumably read the Constitution as, if anything, more Lockean than the Declaration, his thesis at best reinforces, and at worst is irrelevant, to the following analysis of the Constitution as expressing a Lockean theory of popular sovereignty. *See also* Lewis, *Adam Smith and the Moral Theory of Liberal Constitutionalism*, in THE REVIVAL OF CONSTITUTIONALISM 104 (J. Muller ed. 1988) (Constitution designed to implement Declaration, which was largely condensation of Locke's *Second Treatise*).

66. U.S. CONST. preamble.

67. *Cf.* Chisolm v. Georgia, 2 U.S. (2 Dall.) 419, 463 (1793) (Wilson, J.) ("[O]ur national scene opens with the most magnificent object, which the nation could present. 'The people of the United States' are the first personages introduced.").

speaking in their voice.[68] Second, it refers to the "People of the United States," thus identifying a distinct society already in existence at the time of the drafting of the Constitution. Third, the preamble reveals that it is the people of the United States who are establishing the Constitution, thereby creating a government for themselves. Thus, the preamble suggests (1) a people, (2) comprising a pre-existing society, (3) establishing a government—the essence of Lockean popular sovereignty.

The body of the Constitution contains similar clues. The very first provision of the Constitution, article I, section 1, refers to the "legislative Powers herein granted." But who grants these powers? Since the only prior text is the preamble, certainly the most logical referent seems to be the people of the United States: it is they who grant legislative power to the government. The concept of the people of a society granting legislative power to a government is distinctly Lockean and amounts to strong evidence of an underlying constitutional theory of popular sovereignty.

Similarly, articles I, II and III all state that the legislative, executive and judicial powers are "vested"—again presumably by the people—in the Congress, the President and the courts, respectively.[69] The explicit designation of Congress as the supreme lawmaker;[70] the provision for popular election of legislative representatives;[71] the requirement of ratification by special popular conventions;[72] the reservation by the people of unenumerated rights in the ninth and tenth amendments; and the general structure of the body of the Constitution itself, which

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68. The presence of "the people" as a player on the constitutional stage is not by itself inconsistent with classical thought; the people played a role in classical political theory as well as in Locke's. *E.g.*, ARISTOTLE, *supra* note 29, at 151-57 (varieties of democracy). If the Constitution were a classical republican document, however, it seems unlikely that the people would speak as the makers of fundamental law as they do in the preamble. In classical thought, laws were frequently viewed as having an independent existence distinct from the people who lived under them rather than owing their existence to the people. *See, e.g.*, PLATO, *Crito*, in THE DIALOGUES OF PLATO 27, 36-41 (1986). Moreover, where humans were involved in the creation of law, the classical model seems to be more one of the heroic lawgiver, on the model of a Solon or a Draco, than the one of popular creation of laws for society suggested by the Constitution. *See, e.g.*, Plutarch, *Solon*, in THE RISE AND FALL OF ATHENS 43 (1960); THE FEDERALIST, No. 38, at 231-32 (J. Madison) (C. Rossiter ed. 1961). *See also* MACHIAVELLI, THE DISCOURSES, Bk. 3, ch. 1, at 387 (B. Crick ed. 1970) (1531) (renewal of society accomplished either by virtuous men, or by institutions, which must themselves be brought to life by virtuous men).

69. U.S. CONST. art. I, § 1; art. II, § 1; art. III, § 1.

70. *Id.*, art. VI.

71. *Id.*, art. I, § 2.

72. *Id.*, art. VII.

purports to dictate both the form of government and the scope of powers granted, all point strongly to a Lockean notion of popular sovereignty based on consent of the governed.

b. Historical Evidence

The historical record brims with evidence that the framers embraced an essentially Lockean theory of popular sovereignty. A brief review of the highlights will suffice here, since much of this evidence has been set out elsewhere in detail.[73] For example, there is a "state of nature," said Madison[74]—or "savage State," as both he and Gouverneur Morris also termed it[75]—in which insecurity impels individuals to establish government.[76] As a result, said James Wilson, government is "derived from the people."[77] It follows, according to Hamilton, that "[t]he fabric of American empire ought to rest on the solid basis of THE CONSENT OF THE PEOPLE. The streams of national power ought to flow immediately from that pure, original fountain of all legitimate authority."[78] Others echoed this aquatic imagery. According to Madison, "the people are the only legitimate fountain of power."[79] The people, said Wilson, are "the fountain of government."[80] "All authority," remarked Charles Pinckney, "flows from and returns at stated periods to, the people."[81] In these circumstances, according to Oliver Ellsworth, "all the power government now has is a grant from

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73. *E.g.*, G. WOOD, *supra* note 20, at 344-89, 543-47, 593-615; Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1429-66 (1987).

74. THE FEDERALIST, No. 51, at 324 (J. Madison) (C. Rossiter ed. 1961); *see also* J. MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 153 (A. Koch ed. 1966) [hereinafter MADISON, NOTES OF DEBATES] (remarks of Luther Martin and Alexander Hamilton, June 19, 1787 both referring to state of nature).

75. Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), *reprinted in* 10 THE PAPERS OF JAMES MADISON 206, 212 (A. Rutland ed. 1977); MADISON, NOTES OF DEBATES, *supra* note 74, at 244 (remarks of Gouverneur Morris, July 5, 1787).

76. THE FEDERALIST, No. 51, at 324-325 (J. Madison) (C. Rossiter ed. 1961).

77. MADISON, NOTES OF DEBATES, *supra* note 74, at 189; *see also* THE FEDERALIST, No. 37, at 227 (J. Madison) (C. Rossiter ed. 1961) ("all power should be derived from the people"); *id.* No. 9, at 72 (A. Hamilton) (people represented by "deputies"); *id.* No. 78, at 467 (A. Hamilton) (same).

78. THE FEDERALIST, No. 22, at 152 (A. Hamilton) (C. Rossiter ed. 1961).

79. THE FEDERALIST, No. 49, at 313 (J. Madison) (C. Rossiter ed. 1961); *see also* MADISON, NOTES OF DEBATES, *supra* note 74, at 564 (remarks of James Madison, Aug. 31, 1787) ("The people were in fact, the fountain of all power.").

80. G. WOOD, *supra* note 20, at 535; *accord* MADISON, NOTES OF DEBATES, *supra* note 74, at 82 (government "ought to flow from the people at large").

81. G. WOOD, *supra* note 20, at 596.

the people."[82] The government, said John Jay, exercises "no rights but such as the people commit to them."[83] Madison described a republic as characterized by "the delegation of the government . . . to a small number of citizens,"[84] making government officials merely "agents and trustees of the people."[85] Even when they have delegated governmental power to their agents, said Wilson, in the United States, the people retain supreme power.[86]

It would be possible to give many more examples. Indeed, it is undoubtedly the prevalence of such expressions that led Carl Becker to call the philosophy of natural rights a "commonplace" in the late eighteenth century, and Locke's works "a kind of political gospel."[87] Even Gordon Wood has written that it was "axiomatic by 1776 'that the only moral foundation of government is, the consent of the people.' "[88]

c. *Judicial Interpretation*

Several decisions of the Supreme Court lend further support to the notion that the Constitution can be seen as embodying a Lockean theory of popular sovereignty. Some of the earliest decisions make this point quite explicitly. In *Chisolm v. Georgia*,[89] the Court's first real constitutional case, the Court was called upon to decide whether a state could be sued by a citizen of another state. Several of the justices discussed the nature of governmental sovereignty at some length.[90] Justice Iredell noted that a state "derives its authority from . . . [t]he voluntary and deliberate choice of the people."[91] Justice Wilson, a signer of the Declaration and a delegate to the constitutional convention, wrote a lengthy opinion in which he touched upon the "original sovereign[ty]"

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82. *Id.* at 542.

83. *Id.* at 546.

84. THE FEDERALIST, No. 10, at 82 (J. Madison) (C. Rossiter ed. 1961). *See also id.*, No. 2, at 37 (J. Jay) (people cede some natural rights to government "in order to vest it with requisite powers").

85. THE FEDERALIST, No. 46, at 294 (J. Madison) (C. Rossiter ed. 1961); *see also id.*, No. 78, at 467 (A. Hamilton) (government is agent of the people).

86. G. WOOD, *supra* note 20, at 599.

87. C. BECKER, *supra* note 7, at 24, 27.

88. G. WOOD, *supra* note 20, at 182; *see also* T. PANGLE, *supra* note 10, at 176 (by late eighteenth century there was "a largely Lockean consensus on political first principles"); C. ROSSITER, SEEDTIME OF THE REVOLUTION (1953) (describing political thought of American revolutionaries).

89. 2 U.S. (2 Dall.) 419 (1793).

90. There was no opinion of the Court; each Justice delivered his own opinion.

91. Chisolm v. Georgia, 2 U.S. (2 Dall.) 419, 448 (1793).

of free men.[92] Justice Wilson defined a republican government as one in which "the supreme power resides in the body of the people,"[93] and stated that just laws "must be founded on the consent of those whose obedience they require."[94] Chief Justice Jay, one of the authors of *The Federalist*, gave a detailed and essentially Lockean explanation of the Constitution, calling it "a compact made by the people of the United States, to govern themselves."[95] He also observed that "sovereignty," by which he meant "the right to govern," in the United States "rests with the people" rather than "the Prince";[96] that is, with the people rather than the government.

Justice Iredell expressed similar sentiments in *Penhallow v. Doane*.[97] And Justice Paterson, a former delegate to the constitutional convention, weighed in soon after with a discussion of his own delivered while sitting on circuit in *Vanhorne's Lessee v. Dorrance*: "The constitution," he said, "is the work or will of the people themselves, in their original, sovereign, and unlimited capacity."[98] Chief Justice John Marshall also expressed a typically Lockean theory of popular sovereignty in *McCulloch v. Maryland*:[99] "The government of the Union, then, . . . is emphatically and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit."[100] Since then, the Court has expressed fairly consistently ideas of popular sovereignty that are basically Lockean, referring explicitly to popular sovereignty or consent of the governed as the basis of state and national government on many occasions. For example, in a 1976 case the Court referred to the United States as "a republic where the people are sovereign."[101] In a 1979 case, the Court said that the government of each state "governs only with the consent of the governed."[102]

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92. *Id.* at 456.

93. *Id.* at 457.

94. *Id.* at 458. *See also id.* at 465 ("the people of the United States intended to form themselves into a nation . . . [and] instituted, for such purposes, a national Government").

95. *Id.* at 471.

96. *Id.* at 472.

97. 3 U.S. (3 Dall.) 54, 93 (1795).

98. 2 U.S. (2 Dall.) 304, 308 (1795).

99. 17 U.S. (4 Wheat) 316 (1819).

100. *Id.* at 404-05.

101. Buckley v. Valeo, 424 U.S. 1, 14 (1976) (per curiam).

102. Nevada v. Hall, 440 U.S. 410, 426 (1979). *See also* Holt Civic Club v. Tuscaloosa, 439 U.S. 60, 70 (1978); Hunter v. Erickson, 393 U.S. 385, 392 (1969); Afroyim v. Rusk, 387 U.S. 253, 257 (1967); Bute v. Illinois, 333 U.S. 640, 651 (1948); Board of Educ. v. Barnette, 319

C. *The Lockeanism of the Constitution*

The Lockean theory of popular sovereignty deals with some of the most fundamental issues in political theory, including the nature of sovereignty, the origins of government, and the sources of governmental legitimacy and authority. Lockean theory also seems to have concrete implications for fundamental issues such as the nature of political tyranny, and the meaning of, and reasons for, obedience to law. The Lockean idea of popular sovereignty may also have far more attenuated implications, however, for such other significant issues as the nature of citizenship, the role of or need for civic virtue, the nature of the common good, and the proper objects of government. Clearly there is some play in the joints: the theory of popular sovereignty is broad enough to embrace, for example, both Hobbesian and Lockean views of human nature.[103]

U.S. 624, 641 (1943); Perry v. United States, 294 U.S. 330, 353 (1935); Adams v. Children's Hosp., 261 U.S. 525, 544 (1923); Halter v. Nebraska, 205 U.S. 34, 43 (1907); McPherson v. Blacker, 146 U.S. 1, 25 (1892); Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886); Texas v. White, 74 U.S. (7 Wall.) 700, 721 (1868). There are also a number of cases in the first amendment area that advance to varying degrees a theory of the first amendment as protecting the institution of popular self-government. *See, e.g.*, Red Lion Broadcasting Co. v. Federal Communication Comm'n, 395 U.S. 367, 390 (1969); Virginia State Bd. of Pharmacy v. Virginia Consumer Council, 425 U.S. 748, 765 (1976); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 587 (1980) (Brennan, J., concurring).

It is possible to argue that the more recent of these citations do not really support the proposition that the Court has continued to view the Constitution as embodying a Lockean theory of popular sovereignty—that the Court meant something different when it used the language of popular sovereignty in 1880 or 1980 from what it meant in 1795. To a certain extent, there is indeed an element of lip-service in the Court's invocation of popular sovereignty in the later cases. While it is impossible here to deal fully with this question, I would argue in brief that the Court's view of the fundamental nature of the Constitution has remained relatively constant over the centuries, as has the view of American society in general. *See* M. KAMMEN, A MACHINE THAT WOULD GO OF ITSELF 381 (1986) ("the fundamental character of American constitutionalism [has] change[d] so little when most other aspects of national life have significantly altered"). First, the Court still seems to view itself as engaged in the enterprise of holding the people's agents to the terms of the people's instructions. *See, e.g.*, United States v. Butler, 297 U.S. 1, 62 (1936) (Court does not overrule people's representatives, it enforces Constitution as supreme law "ordained and established by the people"); Florida v. Royer, 460 U.S. 491, 512 (1983) (Brennan, J., concurring) (Court has "unflagging duty to strike down official activity that exceeds the confines of the Constitution"). Second, the Court has continued to invoke popular sovereignty in situations that do not seem out of place or inconsistent with the ways in which we might have expected the concept to be invoked in the eighteenth century. *See, e.g.*, Afroyim v. Rusk, 387 U.S. 253 (1967) (striking down law permitting government to strip citizens of citizenship, a situation directly implicating the power of society to determine its membership).

103. Thus, while both Hobbes and Locke viewed the origins of government as based, at least initially, on consent, *see supra* notes 47-49, Hobbes characterized the state of nature as a state of perpetual war of all against all, T. HOBBES, *supra* note 41, at 141-45, whereas Locke

To some extent, the Constitution, to say nothing of the thought of the framers, can accommodate a mixture of Lockean and republican ideas. Indeed, despite the vagueness of the participants, it is possible to view the current debate over the influence of republicanism as taking for granted that the Constitution's roots in popular sovereignty are Lockean. This is especially so given recent clarifications by several leading exponents of republicanism, who argue that criticisms of their work have exaggerated the scope of the claims they intended to make on behalf of the republicanism of the founding.[104] In any event, regardless of the scope of actual or potential claims on behalf of republicanism, the textual and historical evidence, supplemented by judicial interpretations, reveals a Constitution that reflects an essentially Lockean theory of popular sovereignty under which governmental legitimacy rests on the consent of the governed. This theory is the starting point for the analysis that follows.

II. ELECTIONS AND GOVERNMENTAL LEGITIMACY

The Lockean constitutional requirement making consent a condition of governmental legitimacy has important implications for the conduct of elections under the Constitution. In a sense, this seems intuitive: there is something consensual about the popular election of a candidate for public office. The electoral institution turns out to be somewhat more complex than this intuitive link reveals; nevertheless, as illustrated in this section, elections and governmental legitimacy are intimately related. Furthermore, because election laws and procedures can so importantly influence election results, they too can have a great impact on governmental legitimacy. This, I will argue, suggests a potential method of constitutional analysis for election laws and regulations.

A. The Multiple Meanings of "Election" In Lockean Theory

An analysis of the relation between governmental legitimacy and elections is complicated by the fact that the term "election" does triple duty in the constitutional realm of popular sovereignty. First, the term at times refers to the people's sovereign act of choosing agents to run

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characterized it as a more peaceful condition in which people endeavor to preserve each other and punish transgressors fairly. J. LOCKE, THE SECOND TREATISE, *supra* note 40, §§ 6-8, at 9-10.

104. *See, e.g.*, Pocock, *Gog and Magog*, *supra* note 31, at 336-46 (1987); *see also* Banning, *supra* note 29.

the government. Second, the term sometimes refers to the rule of decision—for example, majority rule—which by agreement governs the making of the sovereign choice. Third, the term also refers to the system of voting by which the people's sovereign decisions are revealed to themselves and to their agents. Before attempting to define the relation of elections to legitimacy, it is necessary to untangle these different meanings.

1. The Election as a Specialized Act of Sovereign Choice

According to the Lockean theory of popular sovereignty, a government is merely the agent of the people of a society who have decided, for their own benefit, to create the government. To transform this abstract principle into practice, however, requires that important decisions be made, as the men who met in Philadelphia in 1787 to draft the Constitution discovered. At a minimum, for instance, a form of government must be chosen.[105] Furthermore, a government cannot operate on paper; it must be populated with flesh-and-blood officials to do its work. The people must therefore appoint specific individuals to serve as their governmental agents. The people's decision to create a government in the form of a republic—a decision, incidentally, by no means compelled by the theory of popular sovereignty[106]—generally entails a decision to appoint governmental agents through periodic elections.[107]

From the perspective of the Lockean theory of popular sovereignty, there are at least two different ways to view an election under a republican form of government. The first is to conceive of the election as a sovereign act of the people, essentially unconfined and uncontrolla-

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105. *See, e.g.*, J. LOCKE, THE SECOND TREATISE, *supra* note 40, § 89, at 47-48 (legislative power is identical with society itself); *id.* § 132, at 68-69 (form of government determined by location of legislative power); *id.* § 134, at 69-70 (appointment of legislative). *See supra* note 49.

106. J. LOCKE, THE SECOND TREATISE, *supra* note 40, § 132, at 68-69 (people can create government in form that seems best to them); *cf.* The Declaration of Independence para. 2 (U.S. 1776) (people may "institute new government, laying its foundation on such principles, and organizing its power in such form, as to them shall seem most likely to effect their safety and happiness"). There is a distinct tendency among constitutional scholars to confuse popular sovereignty with democracy. *See* A. BICKEL, *supra* note 38; *cf.* P. PARTRIDGE, *supra* note 54, at 23-24 (idea of consent has survived as element of democratic theory, which tends to view consent as possible only in what we think of as democratic regimes). However, the two are not the same; one can have popular sovereignty under a monarchical form of government as much as under a direct democracy. The point of popular sovereignty is to let the people choose what form of government to establish.

107. This is the classic Madisonian definition of a republic. THE FEDERALIST, No. 39, at 82 (J. Madison) (C. Rossiter ed. 1961).

ble because taken in their sovereign capacity. In other words, an election is an exercise of the people's sovereign power to choose governmental agents, and because sovereignty is by definition complete and essentially absolute,[108] a sovereign act is unlimited by any rightful power other than the sovereign wishes of the people themselves. This view has a certain intuitive appeal: the appointment of governmental agents is certainly one of the essential acts of a sovereign people; it assures that the government exists, at least at its inception, with the consent of the people. The initial consent exists because it is presumably impossible—indeed, it is a contradiction in terms—for the people to appoint an agent to whose rule they do not consent. Thus, elections are truly the means by which consent, and therefore governmental legitimacy, is conferred.

An alternative view conceives of elections as something much more limited. This view emphasizes that the people have not consented merely to be ruled by whomever they happen to appoint; on the contrary, they have consented to be ruled by such a person only within the very defined framework of the particular republican government they have chosen to erect. In this view, the people's election of a particular person to exercise governmental powers manifests only the tiniest portion, if any portion at all, of what the Lockean theory would term their consent. The vast bulk of their consent is directed to the form of government, the division and enumeration of its powers, and even the electoral institution itself, which is nothing more than the product of the prior agreement that outlined the form and mechanisms of the government.[109] To give an example, the people's election of George Bush in 1988 does not mean they have consented to be ruled by Mr. Bush. It means only that, having previously consented to be ruled by a government divided into three branches, of which the executive branch exercises only certain very limited and clearly defined powers, they further agree that George Bush may occupy a particular, highly circumscribed office within this branch for a period of no more than four years.

This limited view is all the more appealing when, as in the United States, the constitution is written, and includes a provision for periodic

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108. To natural law theorists, no sovereign power has the authority to violate natural law; thus, the sovereignty of the people must be understood as absolute within the confines of natural law. *See, e.g.*, J. LOCKE, THE SECOND TREATISE, *supra* note 40, § 23, at 17.

109. *See* P. PARTRIDGE, *supra* note 54, at 51 (alluding to distinction between consent to form of government and consent to particular government or to its policies); Pitkin, *supra* note 54, at 42.

elections.[110] If there is Lockean consent to be found in this system, is it not to be found in the creation of the constitution itself? The constitutional requirement of elections by the people is thus merely the product of this prior sovereign act of consent, and the elections themselves are not sovereign acts at all. Rather, an election is a routine governmental act in which the people function essentially as an organ of government rather than as sovereigns.[111] Indeed, the people have gone so far as to permit their electoral role to be regulated by law,[112] something potentially incompatible with the taking of actions in their sovereign capacity. Thus, although the election may be important, it has no more significance in the Lockean sense than does the passage of a law by Congress, a presidential appointment to an agency, a decision by a federal court, or any other routine act of constitutional governance.[113]

For Locke and for the framers, the true nature of elections in a republican government seems to lie between these two extremes. Under the Constitution, an election is considered an act of the people in their sovereign capacity because it involves the appointment of agents and the expression of consent. Both of these factors play an integral role in the operation of popular sovereignty: they are essential to and inseparable from the concept of popular self-rule,[114] and are vital to the legiti-

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110. The analysis is the same, however, even without a written constitution because there is still prior agreement to create a government in which periodic elections are held, whether this aspect of the agreement is written or not. At least, this is the British view.

111. *Cf.* H. PITKIN, THE CONCEPT OF REPRESENTATION 41 (1967) (in view of *Organschaft* theorists, "[e]ven the voter may be seen as an organ of the state").

112. *E.g.*, U.S. CONST. art. I, § 4; *see* J. LOCKE, THE SECOND TREATISE, *supra* note 40, § 198, at 101 (appointment of agents should be governed by law).

113. This could be the ultimate view of some people who justify failing to vote on the ground that "it doesn't matter who wins." To these people, the important thing may be the form of the government and the activities and liberties it protects. Who occupies any particular office may thus be of little consequence so long as the overall structure of the government is satisfactory.

114. J. LOCKE, THE SECOND TREATISE, *supra* note 40, §§ 141, 198, at 74-75, 101. Alternatively, one might say that the nature of most forms of Lockean popular sovereignty makes it theoretically impossible for the people to delegate governmental power to themselves. In Lockean theory, the government bears a relation to the people much like that of an agent to his principal. *See supra* note 50; *see also* THE FEDERALIST, No. 78, at 467 (A. Hamilton) (C. Rossiter ed. 1961). To say that the people act at an election like a mere organ of government is to make the somewhat anomalous claim that a principal can act as his own agent. While a principal certainly has the power to *behave* in any given situation as though he were his own agent, he does so only through the exercise of voluntary self-restraint, retaining in spite of himself the ability to exercise all powers he has as a principal at any time. *Cf.* Bowsher v. Synar, 478 U.S. 714, 737 (1986) (Stevens, J., concurring) (Congress cannot delegate legislative power to itself or its components).

The one situation in which such an arrangement might make sense would be in a pure democracy, where the people participate directly in governance. In that situation, the people might well choose as an act of voluntary self-restraint for their own safety and convenience to submit to

macy of the government.[115] The holding of an election thus implements the decision of the people to assure that their representatives "should have an immediate dependence on, and an intimate sympathy with, the

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rules—i.e., law—in their exercise of governmental power even though, in theory, they could as a group change or discard the rules at any time. *See* J. PLAMENATZ, *supra* note 54, at 19 (in pure democracy the people do not consent to the exercise of legislative power because a person cannot "consent" to his own actions). This seems to be the view taken by those states in which limited direct democracy in the form of initiatives and referenda exists: the people as lawmakers are understood to make those laws subject to the state constitution, and the passage of a referendum that conflicts with the constitution is not taken as a subsequent and superseding sovereign act. *See* Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1508 (1990).

The framers, however, were most emphatic that the United States is a republic, not a democracy, in which the people exercise only sovereign power, and governmental power is exercised solely by their representatives. *See* THE FEDERALIST, No. 63, at 387 (J. Madison) (C. Rossiter ed. 1961) (federal government characterized by "the *total exclusion of the people in their collective capacity*, from any share in [the government]") (emphasis in original). Because the whole point of a republic is to create a government in which the people are represented rather than personally present, *see id.* at 386-87, there would be no good reason for the people to create a republic where the people's representatives are elected by the people acting in any capacity other than their sovereign one. That type of self-restraint would be a burden without any commensurate benefit.

Note that this analysis would not apply in situations where the people have deliberately restricted the right to participate in electoral decisions to a subset of the larger body of the people—for example, the wise, or the old, or the rich. In such cases, the people have really designated a subgroup of the people as an agent of all, and the designated individuals vote not as sovereigns, but as agents bound to do the will of all the people. Such a system, when implemented fairly and by consent, amounts to a properly Lockean system of "virtual representation." *See, e.g.*, E. MORGAN, *supra* note 2, at 240-45 (general discussion of virtual representation). Of course, in most cases where popular authority for virtual representation has been claimed, it has doubtless been imposed by a despotic, usurping subgroup of the people, and has lacked the full measure of popular consent necessary to make such a government legitimate.

115. This is just as true when the election is indirect, *see* U.S. CONST. art. I, § 3, cl. 1 & art. II, § 1 (election of Senate and President), as when the election is direct. *Id.*, art. I, § 2, cl. 1 (election of House). According to Locke, government itself, legitimate or otherwise, cannot by definition exist unless there is a lawmaker. *See supra* note 49; *see also* J. LOCKE, THE SECOND TREATISE, *supra* note 40, § 198, at 101. In order for the people of a society to create a government at all, it is necessary for them either to select a lawmaker directly, or to create some method or procedure for the selection and identification of the lawmaker. Direct selection by the people can occur in at least two ways: the people can name the lawmaker at the time they create the government, or they can institute a process in which they periodically assemble to directly select the lawmaker. But the people can also set up indirect systems for selecting the lawmaker. In the case of the original plan for senatorial elections, for instance, the people had some role in the selection, but did not make the ultimate choice. U.S. CONST. art. I, § 3, cl. 1. Or, the people can select the lawmaker even more indirectly by instituting at the time they create the government a procedure, even a self-executing procedure, for the identification of the lawmaker in which the people play no role beyond the initial selection of the method to be used. For example, the people can create a hereditary monarchy under which the identification of the lawmaker is determined by accidents of birth and in which process the people play no role other than the initial one of having selected a hereditary monarchy and having identified the initial monarch. But no matter what method the people choose, the government is legitimate only when there is not only a lawmaker, but one selected by or in accordance with a method prescribed by the people.

people."[116] An election, however, is not an act of *unlimited* sovereignty because, by prior agreement, the people have decided not to reexamine at election time any aspect of the government they have created for themselves except the identity of individual office holders. In other words, at election time the agenda is very different from and much more limited than it is at constitution-making or amendment time. The form of government, for example, is not up for grabs, nor are the duration of an office holder's term or the powers he may exercise during that term. Those items, the people have previously agreed, will be considered at other times and in other ways.[117] Thus, a presidential candi-

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116. THE FEDERALIST, No. 52, at 327 (J. Madison) (C. Rossiter ed. 1961).

117. Thus, Article V of the Constitution embodies a sovereign decision by the people of the United States to deal with any and all changes to the fundamental agreement concerning the form of the government—i.e., constitutional amendments—at a particular time and under specified procedures. U.S. CONST. art. V. *See* Casinelli, *supra* note 54, at 395 ("[I]t cannot be assumed that [the voters] consider elections as opportunities to approve or disapprove of the fundamental principles of a representative government."). This seems to be the position that Bruce Ackerman refers to critically as "leveling democracy" in arguing that the people can amend the Constitution outside the procedural framework of Article V. Ackerman, *The Storrs Lecture: Discovering the Constitution*, 93 YALE L.J. 1013, 1035-37 (1984). From the perspective of Lockean popular sovereignty, Ackerman's conclusions are obviously sound: the people can do what they want, when they want; they are as free to break self-imposed procedural rules as they are to make them. They can amend or abandon the Constitution, in whole or in part, at any time, with or without notice.

What is troubling about Ackerman's position, though, is that he argues not merely that the people can amend the Constitution without resort to Article V, but that they in fact did so during the New Deal era through the medium of ordinary electoral choices. *Id.* at 1055-56. Thus, Ackerman argues that the United States presently operates under a Constitution that is partly written and partly unwritten. Again, there is no theoretical impediment to such an arrangement; Locke, after all, wrote to defend the English Constitution, which has never been reduced to writing. Nevertheless, I find Ackerman's theory implausible for several reasons.

First, the people have successfully employed the procedures set out in Article V on twenty-six occasions, both before and after the New Deal. They seem to have no reason to abandon a process that seems to be working well enough. Second, the people, at least according to Madison, are incapable of moving spontaneously; they require options to be presented to them. The New Dealers did not present this option to the people when they ran for office: although candidates may have held themselves out as standing for change, they did not explicitly present those changes as ones of constitutional dimension. Third, it seems odd that the people would have chosen to work within the constitutional system of elections for constitutionally established offices if what they really wanted to do was change the Constitution—to act simultaneously "out-of-doors" and "in-doors," to paraphrase Gordon Wood's terminology. *See* G. WOOD, *supra* note 20, at 319-28. But fourth and most importantly, Ackerman would have the people abandon a long-standing, deliberate tradition of written constitutions, with all the certainty and stability they bring, in favor of the uncertainty and instability associated with a partly written constitution under which it is impossible to pin down with certainty the "text" of the unwritten provisions, and therefore next to impossible to resolve constitutional disputes. Indeed, Americans might be inclined to doubt whether an unwritten constitution is a constitution in any meaningful sense, at least from the perspective of the American constitutional tradition. I would not infer without much better evidence that the people have taken such a radical step. *See* Amar, *Philadelphia Revisited: Amending the Constitu-*

date whose platform includes a promise to stay in office for six years may win the election, but should consider himself only at his great peril to be empowered to postpone the next constitutionally scheduled election.

In a republican government, then, one meaning of the term "election" refers to a limited or specialized act of sovereign choice designating a particular individual to exercise specific governmental powers as the people's agent. An important element of the people's consent accompanies such a designation: the people consent to be ruled under a government they have created and shaped, and by a particular person they have appointed. When elected, this person becomes, as Locke put it, "the person the people have consented to."[118]

2. *The Election as a Social Rule of Decision*

A second, related meaning of the term "election" is the notion of an election as a rule of decision for making the sovereign choice of whom to appoint as agent of the people. Under the Lockean theory of popular sovereignty, as we have seen, free and autonomous individuals band together voluntarily into civil society, exchanging their right to rule themselves for the security and advantages associated with organized society. In so doing, they agree to be ruled by the society itself. A society, however, cannot rule, or even act, and therefore cannot fulfill the promise of safety and advantage to its members, unless it provides for itself some sort of rule of decision such that each society member regards the decisions so reached to be binding on himself and all others. A rule requiring unanimity would be impractical.[119] Therefore, for the most part, the rule of decision said by natural law theorists to apply to collective decisions of a society is majority rule.[120]

In order to implement majority rule, it is of course necessary to count heads. In the specific case of appointing an agent—i.e., an election—this rule of decision generally requires that the person whom a majority of society's members wish to appoint shall be named the agent of the entire society. The practical necessity of head-counting in this situation introduces a computational element into the process of collec-

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tion Outside Article V, 55 U. CHI. L. REV. 1043, 1048 n.13 (1988) (arguing that constitutional amendment requires a text).

118. J. LOCKE, THE SECOND TREATISE, *supra* note 40, § 198, at 101.

119. J. LOCKE, THE SECOND TREATISE, supra note 40, §§ 97-99, at 52-53.

120. *Id.* The people, however, can also agree to be governed by supermajorities. *See id.* § 99, at 53.

tive self-rule. Indeed, the computational aspect of implementing majority rule greatly complicates a seemingly simple process. In order to accomplish even the most basic acts of self-rule, a society must identify its members; canvass them to learn their opinions; record their preferences; and tote up the results. The computational aspect of implementing the social rule of decision thus entails the possibility of error. I shall call this possibility of error "electoral inaccuracy": the possibility that the declared winner of the election is not in fact the one preferred by a majority of voters. I shall return shortly to this idea.

3. *The Election as a System for Discovering Popular Decisions*

The third way in which the term "election" is frequently used is to refer to the system of campaigning, balloting, and voting that reveals the preferences of the people.[121] The previously mentioned rule of decision can then be applied in order to determine who shall be appointed the people's agent. Like majority rule itself, many aspects of this type of election are dictated by practical necessity.

In a small society, the people may have the ability to meet in a group, discuss issues among themselves, and decide immediately how to act.[122] In a large society, this is impossible; the people's sheer numbers make it, in Madison's words, "impossible for the people spontaneously and universally to move in concert towards their object."[123] To rule

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121. This article does not address the problems associated with denying the right to vote to individuals who are in other ways viewed or ought to be viewed as members of society and thus entitled under the theory of popular sovereignty to a voice in government. There can be no question that one of the most unfortunate divergences between the American theory and practice of popular sovereignty has been the direct disenfranchisement of blacks, women and, periodically, the impecunious. Locke would view this disenfranchisement as political enslavement. *See* J. LOCKE, THE SECOND TREATISE, *supra* note 40, §§ 22-24, 169-243, at 17-18, 88-124. *See* Steinfeld, *Property and Suffrage in the Early American Republic*, 41 STAN. L. REV. 335 (1989); *see also* Amar, *supra* note 117, at 1075 n.117. This article focuses not on the problems associated with identifying society's members, but on the problems associated with consulting through elections those individuals whom society has designated as its members. For a recent discussion of the distribution of the franchise itself, see Michelman, *Conceptions of Democracy in American Constitutional Argument: Voting Rights*, 41 U. FLA. L. REV. 443 (1989); Levinson, *Suffrage and Community: Who Should Vote?*, 41 U. FLA. L. REV. 545 (1989).

122. The Lockean theory of popular sovereignty regards "the people" as a concrete entity capable of at least some types of actions and thoughts. For a very different view, see E. MORGAN, *supra* note 2 (arguing that "the people" is a fiction that sustains government authority, much as the divine right of kings was a fiction which was eclipsed for historical reasons by the fiction of popular sovereignty). *See also* Pocock, *Gog and Magog*, *supra* note 31, at 337 (American "foundational myth" of covenant).

123. THE FEDERALIST, No. 40, at 253 (J. Madison) (C. Rossiter ed. 1961).

themselves effectively, the people are forced both to appoint representatives to act for them,[124] and, frequently, to rely on those representatives to propose ideas for the people's assent or rejection.[125]

If the people's great number makes them immobile, it also makes them inarticulate: they are too numerous to formulate a single opinion, too numerous, perhaps, even to hold one.[126] Even when a majority of the people holds an opinion which society and its agents wish to consult, it must be extraordinarily difficult for the majority to communicate its wishes. Likewise, it must be difficult for the people and their agents to recognize the opinions so expressed as that of the majority. Consequently, a society must devise some method, however imperfect, for attempting to discover the wishes of a majority of its members. The nature of the people suggests three aspects essential to such a system. First, because the people are immobile, they cannot on their own find and mutually agree upon a single person to appoint as their agent; instead, candidates must be brought before the people for their choice. Second, because the people are inarticulate, they cannot easily voice their preferences. Their choice must be recorded by some means, such as a vote by ballot. Third, the ballots must be collected, and the previously agreed upon rule of decision must be applied to determine whom the people have chosen.

Ironically, this electoral method, certainly the most common now in use, may well further reduce the articulateness of the people. Under this voting system, the people frequently are reduced to a collective vocabulary that is almost infantile in its simplicity; indeed, it often consists of only two words: yes or no, Line A or Line B, Republican or Democrat. And even when the people speak clearly enough in this limited way, shouting an answer to some binary question put before them, their meaning remains cloudy in other respects. Did they even understand the question? Did they understand how to record their individual

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124. *E.g.*, B. DE MONTESQUIEU, THE SPIRIT OF THE LAWS Bk. II, ch.2, [6], at 107 (D. Carrithers ed. 1977) (1748) ("The people . . . ought to do of themselves whatever conveniently they can; and what they cannot well do, they must commit to the management of ministers."); *see also* MADISON, NOTES OF DEBATES, *supra* note 74, at 74 (remarks of James Wilson, June 6, 1787) ("Representation is made necessary only because it is impossible for the people to act collectively.").

125. THE FEDERALIST, No. 40, at 253-54 (J. Madison) (C. Rossiter ed. 1961).

126. *See* THE FEDERALIST, No. 10, at 78 (J. Madison) (C. Rossiter ed. 1961) ("As long as the reason of man continues fallible . . . different opinions will be formed."); J. LOCKE, THE SECOND TREATISE, *supra* note 40, § 98, at 53 ("[T]he variety of Opinions, and contrariety of Interests, which unavoidably happen in all Collections of Men. . . .").

responses? Why did they vote the way they did? Did they approve of all the many planks in the platform of a successful candidate? Was it the candidate's positions or character that they found most appealing? Attempts to answer questions like these have spawned whole branches of political science devoted to studying the electorate, not to mention a vigorous and profitable political polling industry.

B. The Need for Electoral Accuracy

The foregoing discussion shows what I think ought to be intuitive: that there is a strong and direct link between elections and the legitimacy of a republican government. First, an election is a specialized sovereign act of choice by the people; it is the means by which the people exercise their sovereign right to choose the agents who will wield governmental power. The election is also therefore the means by which the people express their consent to a particular government run by particular individuals. Second, an election in a republic implements the rule of decision by which the people have agreed to make their sovereign choice of agents. Third, an election is a system for obtaining data about the wishes of the people, data to which the rule of decision is applied in order to determine whom the people have actually appointed as their agent.

Elections also affect governmental legitimacy in corresponding ways. Because the people alone have the right to appoint agents in a republic, only a government consisting of individuals to whom the people have consented can be legitimate. Furthermore, only candidates selected by application of the agreed upon rules of decision to the respective individual choices of the people can legitimately take office. Finally, since only the people's actual choice can legitimately claim the reins of government, the people must provide themselves with the best possible data from which to determine their own choices. A defect at any point in this chain can, according to the Lockean theory of popular sovereignty, undermine the legitimacy of both the apparent winner of an election and the government in which he or she serves. A discrepancy in the process thus has the potential to transform an apparently successful candidate into a usurper whose actions are invalid and whose laws need not be obeyed—certainly a dire result.[127]

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127. One need not view an election as an act of sovereign choice in order to reach the same conclusion. Even if an election is only a routine act of constitutional governance, *see supra* text accompanying notes 109-13, and the misidentification of the people's governmental agent is merely an unconstitutional government action, it is nevertheless an unconstitutional action that

The principal means by which such discrepancies can creep into the process is through the choice of election procedures and the enforcement of elections laws.

C. *The Influence of Electoral Procedures on Electoral Outcomes*

Elections have been conducted in this country in the same way for so long that it is difficult to conceive of their being conducted in any other way, much less to view some other way as equally "good" or "proper." Yet we must put aside our preconceptions for a moment in order to appreciate the impact that electoral procedures can have on electoral outcomes. Procedure, as Justice Frankfurter once observed, "goes to the very substance of law."[128] This is as true for elections as for any other area of law: the procedural scheme under which candidates run for office and voters elect them can affect decisively who wins the election. As Madison himself put it at the constitutional convention during a debate concerning the power to regulate elections to Congress: "the result will be somewhat influenced by the mode."[129]

An example will help to clarify this proposition. In the 1984 congressional election in Indiana's fifth election district, the vote was so close that several recounts were ordered under state and, later, federal control. Different counts produced different winners. Finally, a House panel conducted a final recount which resulted in a four-vote victory for the Democratic candidate.[130] Obviously, the people of the fifth dis-

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poses a far greater threat to legitimacy than other such acts. This is because the misidentification of the agent can rob all the agent's actions of the people's consent, whereas the exceeding of constitutional bounds by a particular act of a properly identified agent deprives only that single act of the people's consent. It is far less likely that the people will have no tolerance for the latter than for the former. *See infra* notes 154-64 and accompanying text; *see also* J. BURLAMAQUI, *supra* note 41, at 93 ("If, for the smallest faults, the people had a right to resist or depose their sovereign, no prince could maintain his authority, and the community would be continually distracted . . . ."); The Declaration of Independence para. 2 (U.S. 1776) ("[A]ll experience hath shewn that mankind are more disposed to suffer, while evils are sufferable than to right themselves by abolishing the forms, to which they are accustomed.").

128. Cook v. Cook, 342 U.S. 126, 133 (1951) (Frankfurter, J., dissenting). *Accord* Brown v. Western Ry. of Alabama, 338 U.S. 294, 296 (1949) (impossible to "lay[] down a precise rule to distinguish 'substance' from 'procedure' ").

129. MADISON, NOTES OF DEBATES, *supra* note 74, at 423 (remarks of James Madison, Aug. 9, 1787).

130. *See* Roberts, *House Democrats Seat Indianan, and the Republicans Walk Out*, N.Y. Times, May 2, 1985, at A1, col. 1. Extremely close elections are by no means uncommon in this country. For example, the 1974 North Dakota senate race was decided by a margin of only 186 votes out of 235,661 cast. McLain v. Meier, 637 F.2d 1159, 1166 n.13 (8th Cir. 1980).

trict were very evenly divided about whom they wished to appoint to represent them in Congress.

It is not difficult to imagine how even the slightest change in electoral procedures could have changed the outcome of this election. Suppose the election had been held on Sunday morning from 8:00 a.m. until noon instead of all day Tuesday. It is not extravagant to suppose that four people in Indiana's fifth district might have been unable to go to the polls because their religious beliefs compelled them to be in church, and that the outcome of the election might then have been different. Similarly, if the election had been held on Saturday, no Orthodox Jews would have been permitted by their religion to go to the polls, again potentially influencing the outcome.

Of course, the Tuesday voting day did not present any such religious obstacles, but suppose that the polls had been open on Wednesday as well as on Tuesday. Is it not possible that four people who failed to vote on Tuesday because they simply could not get away from the office, or because they suddenly became ill, or because their cars broke down unexpectedly, would have been able to make it to the polls on Wednesday? Might the result then have been different? And what might have been the result had the polls stayed open all week?

Tinkering with the day on which an election is held may seem like an extreme way to make a point. It is not. Suppose the state of Indiana had forbidden women to vote, as it did until 1921,[131] or had forbidden blacks to vote, as it did until 1881.[132] Suppose Indiana had a property qualification for voting eligibility, as Connecticut had until 1845,[133] or had imposed a poll tax, as Virginia did until 1966.[134] Suppose it had required a literacy test, as numerous states did until 1965.[135] Or suppose that, rather than excluding people from the vote, Indiana had a law *requiring* eligible citizens to vote, as was the case in eighteenth-century Georgia[136] and is now the case in Austria, Switzerland, and

131. IND. CONST. art. II, § 2 (1921).

132. IND. CONST. art. II, § 2 (1881).

133. CONN. CONST. art. VI, § 2 (1818), as amended by art. VIII (1845).

134. Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966).

135. *See* Voting Rights Act of 1965, Pub. L. No. 89-110, § 4, 79 Stat. 437, 438 (1965) (banning denial of right to vote for failure to comply with any test); H.R. REP. No. 439, 89th Cong., 1st Sess. (1965), *reprinted in* 1965 U.S. CODE CONG. & ADMIN. NEWS 2437, 2444-47.

136. GA. CONST. art. XII (1777). Virginia also had a compulsory voting law in the late eighteenth century. *See* J. POLE, POLITICAL REPRESENTATION IN ENGLAND AND THE ORIGINS OF THE AMERICAN REPUBLIC 293-294 (1966).

several other countries.[137] Any of these changes could have produced a different outcome in the election results.

Again, these are fairly obvious examples because they affect who is actually eligible to cast votes. It is highly likely that rules determining who is eligible to vote will affect election results, at least if we assume that a diversity of opinion exists among different groups in the general population. Yet more subtle procedural variations can have just as strong an effect on electoral outcomes. An example from ancient Rome makes this point vividly and also illustrates that the problem of procedural influence on electoral outcomes is as old as republican government itself. The society of republican Rome, we are told, was starkly divided by class into patricians and plebeians.[138] Despite the far greater numbers of plebeians[139] and their apparent hostility toward patricians, plebeian candidates frequently lost electoral contests pitting candidates from each class against each other.[140] According to Livy, this phenomenon was the result of "skilful canvassing" by the patrician candidates, whose "veiled menaces masquerad[ed] as humble requests for votes."[141] In other words, the wealthy, powerful patricians threatened and intimidated plebeian voters into voting for them.

The ability of patricians to win elections in this way was eventually undercut by a procedural reform: the introduction of secret ballots. Romans had originally voted openly, each voter in turn stating his preference.[142] Under this system, those inclined to vote against the interests of the powerful patricians could not do so without making themselves known, and so, out of fear, frequently voted the patrician line.[143] The secret ballot eliminated this tactic and, according to Cicero, "deprived the aristocracy of all its influence."[144]

Interestingly, it was not only ancient Romans who used a voice

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137. Comment, *The Revision of American State Constitutions: Legislative Power, Popular Sovereignty, and Constitutional Change*, 75 CALIF. L. REV. 1473, 1503 n.202 (1987) (citing K. PHILLIPS & P. BLACKMAN, ELECTORAL REFORM AND VOTER PARTICIPATION 33 & n.7 (1975)).

138. *See, e.g.*, Livy, *2 History of Rome, reprinted in* LIVY, THE EARLY HISTORY OF ROME 142 (A. Deselincourt trans. 1960) (describing early revolt by plebeians against patrician rule).

139. Over half the inhabitants of Rome were counted in the lowest of six classes based on wealth and status. J. ROUSSEAU, THE SOCIAL CONTRACT 114 (M. Cranston trans. 1950) (1762). *See* Livy, *supra* note 138, at 296-97 (describing qualifications of the six classes).

140. For example, the office of military tribune, open to plebeians and patricians alike, was rarely won by a plebeian. Livy, *supra* note 138, at 296-97.

141. *Id.* at 297.

142. *E.g.*, J. ROUSSEAU, *supra* note 139, at 119.

143. CICERO, DE RE PUBLICA, DE LEGIBUS 499 (C.W. Keyes trans. 1928).

144. *Id.*

vote in a way that allowed candidates to exert pressure on voters. As late as 1870,[145] Virginians voted at congressional elections by lining up at the polling place and stating their preference aloud directly in front of the candidates, each of whom by custom was personally present. The voter then received a handshake and some words of personal thanks from the candidate for whom he voted.[146] Given the much smaller size of local communities in those days, it seems likely that voters knew how their public voting record would affect their private interests.

The use of electoral procedures to influence electoral outcomes is not a practice limited to the early history of this country. In 1968, for example, the Supreme Court struck down a provision of Ohio's election code that essentially kept minor party candidates off the ballot in presidential elections. In *Williams v. Rhodes*,[147] the Court considered a law that allowed the Republican and Democratic parties to secure a position on the ballot in presidential elections by polling ten percent of the vote in the most recent gubernatorial election.[148] Any other party could obtain a ballot position only if it collected a total number of voters' signatures equal to fifteen percent of the total number of votes cast in the preceding gubernatorial election.[149] As a result, the Court said, it was "virtually impossible for any party to qualify on the ballot except the Republican and Democratic Parties."[150] Because getting on the ballot is an obvious prerequisite to winning an election, the Court found that Ohio's election law scheme unconstitutionally burdened the right to vote of supporters of independent candidates and parties under the equal protection clause.[151]

The Supreme Court's decision immediately changed Ohio presidential politics. Whereas under the old rule no party other than the Democratic and Republican parties had received any votes in Ohio presidential elections from 1940 through 1964,[152] in 1968, after the decision in *Williams v. Rhodes*, George Wallace's American Independent

145. *See* VA. CONST. art. III, § 2 (1870) (requiring all elections to be by ballot); 1 A.E.D. HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 375 (1974).

146. E. MORGAN, *supra* note 2, at 185; D. BOORSTIN, THE AMERICANS: THE COLONIAL EXPERIENCE 115 (1958) [hereinafter BOORSTIN, THE AMERICANS].

147. 393 U.S. 23 (1968).

148. *Id.* at 25-26.

149. *Id.* at 24-25.

150. *Id.* at 25.

151. *Id.* at 31, 34.

152. CONGRESSIONAL QUARTERLY, GUIDE TO UNITED STATES ELECTIONS 291-97 (1975).

Party obtained a ballot position and received 11.8 percent of the total Ohio vote for president.[153]

D. Electoral Outcomes and Governmental Legitimacy

1. The Limits of Consent

The interdependence of electoral procedures and electoral outcomes is unavoidable, at least in a large republic such as the United States. And because in a republic electoral outcomes reflect in a significant way the consent of the people, electoral procedures have a great potential to influence and perhaps undermine the legitimacy of an elected government. Due to the open-ended nature of popular sovereignty, however, it is impossible to determine abstractly whether and to what extent a particular election law or procedure affects the legitimacy of a particular government. As with any other aspect of government, one must know the particular preferences of the people who created it in order to judge its legitimacy.

Lockean theory says that the people, as a self-ruling sovereign entity, have the right to construct for themselves a virtually limitless variety of forms of government.[154] As shown above, when the people choose to create a republic, they introduce a certain potential for erroneous identification of those whom the people wish to appoint as governmental agents—a potential for electoral inaccuracy.[155] It does not follow, however, that this potential for inaccuracy necessarily detracts from

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153. *Id.* at 298. The Court has acknowledged explicitly the effect that election laws can have on the outcome of elections: "Each provision of [election codes], whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual's right to vote . . . ." Anderson v. Celebrezze, 460 U.S. 780, 788 (1983); *accord* Republican Party v. Tashjian, 770 F.2d 265, 285 (2d Cir. 1985), *aff'd*, 479 U.S. 208 (1986).

154. *See* J. LOCKE, THE SECOND TREATISE, *supra* note 40, § 132, at 68-69 ("the community may make compounded and mixed forms of government, as they think good"); The Declaration of Independence para. 2 (U.S. 1776) (right of the people to "institute new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness"). Lockean theory, however, also states that natural law places some constraints on the power to form a government. For example, the people cannot submit themselves to slavery. J. LOCKE, THE SECOND TREATISE, *supra* note 40, §§ 22-24, at 17-18.

155. This potential for error, though undoubtedly more frequent and pronounced in republics because of the use of elections, is not unique to republican government. Even if the people wished to establish a government based on hereditary monarchy, as the British claimed to have done, uncertainties concerning the identity of the legitimate monarch can creep in through ambiguities or omissions in the rules of succession. *Compare* J. RAWLS, *supra* note 54, at 85-86 (discussion of procedural justice).

the legitimacy of the government: the people are just as free to tolerate and consent to an electoral system that is inaccurate—i.e., one that from time to time misidentifies the object of their choice—as they are to demand an electoral system that is perfectly accurate.

As a result, the effect on governmental legitimacy of electoral inaccuracy introduced through procedural flaws or irregularities varies according to the details of the actual agreement among society's members as to how they wish to govern themselves. Thus, one society might demand absolute accuracy in its electoral outcomes and withhold its consent from any candidate whose electoral victory is tainted by the slightest hint of inaccuracy. Such a society might make it a crime not to vote,[156] or make "the bribery of [even] one vote . . . sufficient to void the nomination of a successful candidate."[157] A society at the other extreme might have such faith in its electoral process, or in the people it has appointed to administer the process, that the society will consent to be ruled by whoever wins any official election, no matter how that election is actually conducted.

A third society somewhere in the middle might recognize the cost and difficulty of achieving perfectly accurate electoral outcomes,[158] and be willing to consent to the winners of elections that are felt to be reasonably, if not perfectly, accurate. A society with this outlook might for example consent to someone who won an election in which some ballots were lost before being counted, if the loss were nevertheless highly unlikely to affect the ultimate outcome.[159] Many election laws in the United States fall into this third category.[160]

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156. This was, for example, the law in colonial Georgia. GA. CONST. art. XII (1777). More recently, El Salvador instituted compulsory voting during the 1984 presidential election. Meislin, *Latin Vote: Making Do*, N.Y. Times, March 27, 1984, at A6, col. 1. Citizens who failed to vote could be fined, although the law was rarely enforced. *Id.*

157. Carter v. Lambert, 288 Ky. 39, 155 S.W.2d 38, 40 (1941).

158. The larger the society, the more costly and difficult it would be to achieve perfectly accurate electoral outcomes. Some irregularity is bound to slip in when large numbers of people vote, and a large society that insisted on this type of accuracy could find itself paralyzed by an inability to conduct sufficiently accurate elections.

159. *See, e.g.*, Finkelstein & Robbins, *Mathematical Probability in Election Challenges*, 73 COLUM. L. REV. 241 (1973) (discussion of judicial application and misapplication of this approach under New York state law). *See also* Comment, *Electoral Outcomes*, *supra* note 54, at 905 n.57 (citing statutes and cases prohibiting the setting aside of election results unless the number of suspect or invalid ballots is sufficient to change the election outcome).

160. *E.g.*, DEL. CODE ANN. tit. 15, § 5943 (1981); GA. CODE ANN. § 21-2-527(c) (1987); WASH. REV. CODE ANN. § 29.65.100 (1965); Williams v. Venneman, 42 Cal. App. 2d 618, 109 P.2d 757, 759 (1941); Pyron v. Joiner, 381 So. 2d 627, 630 (Miss. 1980). One result of these laws is that someone who cheats can still win an election.

Sometimes a society will make these determinations explicit, as by enshrining them in a constitution. For example, article II, section 1, clause 3 of the United States Constitution specifies in some detail the process by which electoral votes for president are to be counted:

> The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed . . . .[161]

Presumably, these detailed instructions reflect society's determination that the use of the particular process set forth will assure a result sufficiently accurate to justify society's consent to the winner. The provision also suggests, by the same token, that when the government conducts an election in strict accordance with the letter of the Constitution, the winner of the election is justified in presuming that he has the people's consent to exercise the office of President and that he and his administration's exercise of governmental power will be legitimate.

This provision of the Constitution is unusual: it is rare for the people to dictate in such detail the manner in which they would like things done. More typical is article I, section 4, governing congressional elections, which states only that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations . . . ."[162] Even when society has not spoken in detail about electoral procedures, however, it is safe to assume that there is some degree of inaccuracy of electoral outcomes that will not be tolerated, and in the presence of which the people's consent cannot be presumed. This would almost certainly be the case where, for example, all the ballots cast are disregarded by the ruling government, which instead fabricates results showing itself to be unanimously reelected.[163] Whenever such a line is crossed, wherever it may be, the government would not be legitimate because its elected

161. U.S. CONST. of 1789, art. II, § 1, cl. 3 (1789).
162. U.S. CONST. art. I, § 4.
163. *See infra* note 167.

officials would lack the actual consent of the people on whose behalf they claim to act.[164]

2. *The Role of the Court*

The nature of elections under a Lockean constitution gives rise to some difficult problems. Consent is the only basis of legitimate government, yet consent is manifested in a republic partly through elections, a highly imperfect medium for the expression of the popular will. The Constitution sets the terms under which the people's consent can be presumed. But the Constitution is vague in many respects about the ways in which elections should be conducted and the degree to which the people are willing to tolerate electoral inaccuracy before their consent can no longer justifiably be presumed. Lurking in the background is the fact that the people always retain the right to withdraw their consent from the government without regard to whether it is formed consistent with the Constitution; they can abandon the Constitution itself if they wish. The chaos that would result from such a turn of events is something nobody wants.

On the one occasion when just such a chaotic situation was brought before the Supreme Court, the Court declined to get involved. In *Luther v. Borden*,[165] two rival governments each claiming to be the legitimate agent of the people of Rhode Island asked the Court to choose between them. The Court refused, calling the dispute a political question incapable of judicial resolution. While the Court has thus declined to consider the most direct and pressing issues of governmental legitimacy, the Court has frequently reviewed the constitutionality of election laws. The Court's role in such cases can be quite significant because, in many instances, election laws represent deliberate legislative attempts to prevent precisely the type of electoral irregularities that have the potential to call into question the accuracy of the electoral outcome and, consequently, the legitimacy of the elected government.

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164. This is not to say that the only possibility in such a situation is the type of violent resistance associated with the deposing of usurpers. It is possible under the theory of popular sovereignty for the people to give actual consent to the government even after an act of usurpation. *See* J. LOCKE, THE SECOND TREATISE, *supra* note 40, § 198, at 101 (usurper has no right to govern "until the people are both at liberty to consent, and have actually consented to allow and confirm in him the power he has till then usurped"). Such a turn of events bears more than passing resemblance to Hume's suggestion that government rests not on active consent, but on passive acquiescence. *See supra* note 38.

165. 48 U.S. (7 How.) 1 (1849).

The next sections give a brief overview of federal election legislation, and show how election laws frequently aim at enhancing electoral accuracy and therefore assuring governmental legitimacy.

III. The Newtonian Mechanics of Electoral Accuracy: Nineteenth Century Legislative Attempts to Clean Up Elections

Federal election laws fall roughly into two main groups. In the first group are laws prohibiting electoral violence, intimidation, bribery, and fraud. Electoral fraud includes such schemes as multiple voting, impersonation of voters, destruction or miscounting of ballots, ballot-box stuffing, and the like. These laws first appeared in 1870 immediately following the ratification of the fifteenth amendment, and occupied Congress intermittently until as recently as 1965. For want of a better term, I shall call this group of election laws "Newtonian." First, they deal largely with physical offenses against the election process—fists and sticks, theft and destruction. Second, they seem to aim at removing influences that are considered "external" to the election process, as though to allow what we might call bodies already in motion—i.e., voters—to avoid being deflected by these external forces from following their original path toward casting the vote of their choice. Third, despite the fact that these laws occupied Congress until well into this century, the laws in this first group seem to represent an essentially nineteenth-century approach to nineteenth-century problems. Newtonian election laws generally have fared well in the Supreme Court against constitutional challenges.

The second group consists primarily of campaign finance reforms such as contribution and expenditure limitations and public financing, and communication-oriented laws such as bans on exit-polling intended to prevent early media projections of election winners. I shall call laws in this second group "modern" in order to distinguish them from the first group, but also because they seem to conceive of the voting process in a more modern, almost relativistic way. These laws in a sense reject the Newtonian idea of a voter as a body in fixed motion relative to some absolute standard, whose voting inclinations can be given effect simply by removing external impediments to their expression. Instead, modern election laws seem to view the formulation of a voting decision more as a process subject to a wide variety of subtle and occasionally

invisible influences.[166] The modern variety of election laws have fared much worse than their Newtonian predecessors in cases challenging their constitutionality. A discussion of these laws and cases is deferred to Part IV.

Before turning to the laws themselves, let us consider the abuses at which they were aimed.

A. The Persistence of Electoral Abuses

The modern American mind tends to regard gross electoral abuse and fraud as something of a third-world problem: one reads of a Marcos or a Noriega stealing an election[167] and thanks heaven that such a thing could never happen here. In fact, election fraud of an appalling sort is a venerable Anglo-American tradition predating in North America the founding of the United States, and extending in England well back into parliamentary history.

The most common and accepted form of electoral abuse was bribery, or, in its most widespread form, "treating"—that is, "treating the voters to food and drink in heroic quantities"[168] in order to gain their favor. The practice of treating, evidently universal in eighteenth-century England, transformed election campaigns into contests between the candidates to provide the most whiskey to eligible voters. Voters came to expect and demand such favors: in the York election of 1774, a mob threatened a candidate who had not provided what they considered to be an appropriate amount of drink.[169] While treating was prevalent, candidates were by no means above offering cash directly in ex-

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166. *See* Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn From Modern Physics*, 103 HARV. L. REV. 1 (1989) (arguing that shift from Newtonian to Einsteinian scientific paradigms has filtered into society and the law).

167. *See, e.g.*, Gwertzman, *U.S. Adviser to Manila Vote Observers Gives Details of Fraud*, N.Y. Times, Feb. 22, 1986, at A4, col. 1; Groson, *Noriega Stealing Election, Carter Says*, N.Y. Times, May 9, 1989, at A1, col. 4.

168. E. MORGAN, *supra* note 2, at 176. I am indebted to Morgan's account for many of the following examples.

169. L. NAMIER & J. BROOKE, 1 THE HOUSE OF COMMONS 1754-1790, at 400-02 (1964), *quoted in* E. MORGAN, *supra* note 2, at 183. In this country, none other than James Madison himself learned the hard way that treating and flattery of voters was expected. In 1777, Madison ran for the Virginia legislature. It was the "usage, for the Candidates to recommend themselves to the voters, not only by personal solicitation, but by the corrupting influence of spirituous liquors, and other treats . . . ." 1 PAPERS OF JAMES MADISON 193 (W. Hutchinson & W. Rachal eds. 1962) (excerpt from 1832 autobiographical sketch). Madison, regarding these practices as "inconsistent with the purity of moral and of republican principles," declined to campaign in the usual way. He was defeated, "his abstinence being represented as the effect of pride or parsimony." *Id.* *See also* BOORSTIN, THE AMERICANS, *supra* note 146, at 114-15.

change for votes. For example, in the 1780 parliamentary election from Sussex, a candidate addressing a private club said that "if they would honour him with their suffrages he would return the favour with a present of thirty guineas to each voter."[170] After making this speech, the candidate did not even receive a commitment of support from the club; the chairman promised to seek another candidate "who would speak in a language equally intelligible and convincing."[171]

Where bribery was insufficient to guarantee a victory, candidates and their supporters occasionally turned to violence. In the Westminster election of 1784, the polling place became the site of a brawl between supporters of the candidates, each group attempting to secure its own partisans access to the ballot box. An American observer reported: "clubs, fists, and canes were in brisk motion throughout the crowd. . . . [M]any of both parties [were left] mangled and bloody."[172]

Such practices were equally common in America, even after ratification of the Constitution. Following the 1794 congressional election of Francis Preston as a representative from Virginia, a House committee investigating the election found that supporters of Preston threatened to beat supporters of his opponent and that soldiers stationed at the door to the polling place refused to admit supporters of Preston's opponent. A challenge in Congress by the loser was rejected and Preston seated, partly on the grounds that his election was considered to be relatively clean by contemporary southern standards.[173] Even in relatively sedate New England, with its tradition of secret ballots and sober, Calvinist regard for self-government in the service of God,[174] election abuse occurred from time to time. The 1811 election in Salem, Massachusetts was tainted by at least one instance of multiple voting,[175] and in the 1820 election in Williamstown, Massachusetts a voter

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170. L. NAMIER & J. BROOKE, 1 THE HOUSE OF COMMONS 1754-1790, at 389, *quoted in* E. MORGAN, *supra* note 2, at 177.

171. *Id.*

172. E. WATSON, MEN AND TIMES OF THE REVOLUTION 217-18 (1856), *quoted in* E. MORGAN, *supra* note 2, at 182.

173. E. MORGAN, *supra* note 2, at 187-88.

174. E. MORGAN, *supra* note 2, at 183 ("in New England, where a secret ballot generally prevailed, elections were pretty tame affairs"); D. LUTZ, *supra* note 19, at 24-31 (early colonial founding documents reflected goal of self-government in service of God).

175. Commonwealth v. Silsbee, 9 Mass. 417 (1812).

repeatedly attempted physically to seize the ballot box to prevent re-election of the incumbent.[176]

There can be no doubt, however, that American, if not human, ingenuity at perpetrating electoral fraud reached its zenith in the post-Civil War south where whites stubbornly and persistently resisted attempts to enfranchise black citizens. The most blatant resistance to black voting was violent: blacks who attempted to vote were threatened, intimidated, harassed and beaten.[177] The luckier ones were paid to stay away from the polls.[178] More commonly, though, blacks were disenfranchised in less obvious or detectable ways. One technique was to cut off black participation in the political process at its inception by simply making blacks ineligible to vote, in direct defiance of the fifteenth amendment.[179] Where blacks were legally eligible to vote, they were frequently refused registration.[180] Election officials developed a variety of methods to avoid registering blacks, including the discriminatory administration of literacy tests[181] and citizenship tests,[182] and the implementation of voter identification requirements.[183] Poll taxes also were used to keep blacks away, and if a black voter was able to pay the poll tax and sought to do so, his offer to pay would simply be refused.[184] When blacks managed to register to vote, their names were merely purged from the lists.[185]

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176. Commonwealth v. Hoxey, 16 Mass. 385 (1820).

177. *Ex parte* Yarbrough, 110 U.S. 651 (1884); United States v. Cruikshank, 92 U.S. 542 (1875); United States v. Crosby, 25 F. Cas. 701 (C.C.D.S.C. 1871) (No. 14,893); United States v. Amsden, 6 F. 819 (D. Ind. 1881).

178. Lackey v. United States, 107 F. 114 (6th Cir. 1901).

179. Neal v. Delaware, 103 U.S. 370 (1880); Guinn v. United States, 238 U.S. 347 (1915); Myers v. Anderson, 238 U.S. 368 (1915).

180. Lane v. Wilson, 307 U.S. 268 (1939); United States v. Mississippi, 380 U.S. 128 (1965); Alabama v. United States, 304 F.2d 583 (5th Cir. 1962), *aff'd*, 371 U.S. 37 (1962); United States v. Atkins, 323 F.2d 733 (5th Cir. 1963); United States v. Ramsey, 331 F.2d 824 (5th Cir. 1964).

181. Louisiana v. United States, 380 U.S. 145 (1965); United States v. Mississippi, 380 U.S. 128 (1965); United States v. Duke, 332 F.2d 759 (5th Cir. 1964); United States v. Raines, 189 F. Supp. 121 (M.D. Ga. 1960).

182. United States v. Penton, 212 F. Supp. 193 (M.D. Ala. 1962).

183. United States v. Association of Citizens Councils, 196 F. Supp. 908 (W.D. La. 1961); United States v. Manning, 205 F. Supp. 172 (W.D. La. 1962); United States v. Ward, 222 F. Supp. 617 (W.D. La. 1963), *rev'd*, 349 F.2d 795 (5th Cir. 1965).

184. United States v. Dogan, 314 F.2d 767 (5th Cir. 1963); United States v. Munford, 16 F. 223 (E.D. Va. 1883).

185. United States v. Association of Citizens Councils, 196 F. Supp. 908 (W.D. La. 1961); United States v. Wilder, 222 F. Supp. 749 (W.D. La. 1963); United States v. Crawford, 229 F. Supp. 898 (W.D. La. 1964).

Blacks who successfully navigated the treacherous waters of voter registration might find themselves barred from voting by other obstacles. They might be ineligible to vote at a primary election in which, for all practical purposes, the winner of the general election would be selected.[186] If eligible in theory to vote in the primary, they might be excluded from eligibility for party membership, likewise depriving them from voting in a crucial primary.[187] If they managed to appear at a general election, and were not simply turned away from the polls,[188] their votes might be discarded,[189] deliberately miscounted,[190] or diluted through ballot box stuffing.[191] And if whites founds themselves compelled to permit and properly count the votes of blacks, they might attempt to redraw election districts to exclude blacks altogether,[192] or to apportion legislative representation so as to dilute black influence.[193]

It would be wrong to assume, however, that all American election fraud since the Civil War has been aimed at blacks. Abuses often have been employed for political reasons unrelated or not clearly related to race; these abuses have included the casting of fraudulent ballots,[194] impersonation of voters,[195] bribery,[196] multiple voting,[197] vote-buying,[198] restrictive ballot access rules,[199] and even a sham candidacy.[200] Nor is election fraud and abuse exclusively a thing of the past in the United States. For example, in the November 1982 general election in Chicago, twenty-six people, mostly election officials, were indicted for election fraud. Their crimes included forging signatures on ballots of voters

186. Nixon v. Herndon, 273 U.S. 536 (1927); Nixon v. Condon, 286 U.S. 73 (1932); Smith v. Allwright, 321 U.S. 649 (1944).

187. Terry v. Adams, 345 U.S. 461 (1953).

188. United States v. Reese, 92 U.S. 214 (1875).

189. United States v. Mosley, 238 U.S. 383 (1915); United States v. Reese, 92 U.S. 214 (1875).

190. United States v. Classic, 313 U.S. 299 (1941); *In re* Coy, 127 U.S. 731 (1888); *Ex parte* Perkins, 29 F. 900 (C.C.D. Ind. 1887).

191. United States v. Saylor, 322 U.S. 385 (1944); *Ex parte* Siebold, 100 U.S. 371 (1879).

192. Gomillion v. Lightfoot, 364 U.S. 339 (1960).

193. Reynolds v. Sims, 377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186 (1962).

194. Welch v. McKenzie, 592 F. Supp. 1549 (S.D. Miss. 1984), *aff'd*, 765 F.2d 1311 (5th Cir. 1985).

195. Blitz v. United States, 153 U.S. 308 (1894).

196. United States v. Gradwell, 243 U.S. 476 (1917); James v. Bowman, 190 U.S. 127 (1903); United States v. Saenz, 747 F.2d 930 (5th Cir. 1984); United States v. McBosley, 29 F. 897 (D.C.D. Ind. 1886).

197. *McBosley*, 29 F. at 897.

198. State v. Jackson, 73 Me. 91 (1881).

199. Anderson v. Celebrezze, 460 U.S. 780 (1983).

200. Smith v. Cherry, 489 F.2d 1098 (7th Cir. 1973) (per curiam).

who failed to vote and marking and casting those ballots; impersonation of voters; false registration of non-residents; rendering improper "assistance" to elderly and disabled voters; vote-buying; fraudulent dissemination and voting of absentee ballots; illegal registration of aliens; and the use of armed violence against voters and campaign workers.[201] In one precinct, election officials staged their own private election by marking a ballot with a straight Democratic ticket and running that ballot through the tabulating machine over 200 times.[202] The United States Attorney whose jurisdiction included Chicago estimated that ten percent of the entire vote in the city during the November 1982 election was fraudulent.[203]

B. Legislative Controls on Electoral Abuses

According to the Lockean theory of popular sovereignty developed earlier, election abuses can pose grave threats to the accuracy of electoral outcomes, and thus to governmental legitimacy. The exclusion of eligible voters from the electoral process, whether by violence or any other means, deprives society of data crucial to the accurate identification of the winner of the election, and thus impairs society's ability to determine to whom its consent has been given. Similarly, the discarding or mistabulation of votes actually cast violates the social rule of decision that the majority's preferences are to be given effect. In these circumstances, the legitimacy of the elected government may well become doubtful; and the greater the electoral accuracy demanded by the particular society involved, the greater the doubts concerning the legitimacy of a government elected through the use or with the assistance of fraudulent electoral practices.

From this perspective, it is possible to view legislation aimed at curbing electoral abuses as designed to enhance the accuracy of electoral outcomes and, ultimately, to enhance or assure the legitimacy of the elected government. A brief review of major federal legislation enacted to curb these abuses will help to clarify this point.

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201. VOTING RIGHTS ACT: CRIMINAL VIOLATIONS: HEARING BEFORE THE SUBCOMMITTEE ON THE CONSTITUTION OF THE SENATE JUDICIARY COMMITTEE, 98th Cong., 1st Sess. (1983).

202. *Id.* at 17-18.

203. *Id.* at 6. *See also* United States v. Howard, 774 F.2d 838 (7th Cir. 1985) (upholding convictions related to election fraud at Chicago's November, 1982 election).

1. Newtonian Election Laws

The first significant federal legislation designed to eliminate electoral abuses was the Enforcement Act of 1870.[204] As its title suggests, the Enforcement Act was enacted to enforce the fifteenth amendment, which took effect that same year, and which prohibited abridgement of the right to vote "on account of race, color, or previous condition of servitude."[205] The Enforcement Act required that all citizens qualified by law to vote be allowed to vote and that they be given an equal opportunity to perform acts prerequisite to voting, such as registering to vote and paying poll taxes. It also banned the use of force, bribery, threats, and intimidation to interfere with voting or its prerequisites, as well as impersonation of voters and multiple voting.[206]

These provisions of the Enforcement Act can be said to enhance electoral accuracy. Consider, for example, the requirements that all eligible voters be permitted to vote and to perform all prerequisites to voting. The purpose of these provisions is evidently to ensure that all members of society—including former slaves, who were made citizens by the fourteenth amendment—have the opportunity to voice their preferences at the polls and thereby to participate in the process of selecting governmental agents. Legitimacy requires the consent of the governed, not just a small, self-selected portion of the governed. To exclude some of the governed against their will from the process by which popular consent is expressed is to collect information provided by a subgroup of the people rather than by all the people. Such an election can only express the consent of some body other than the true sovereign, which is, by definition, the society as a whole. Consequently, the election result can be said to be inaccurate because it fails to consult and count the expressed preferences of all who are entitled to participate in the sovereign appointment decision, and because it fails to apply the social rule of decision—majority rule, in our case—to the preferences of all of society's individual members. A law forbidding such exclusionary practices can be seen as a reflection of legislative concern that officials elected only by a self-selected subgroup of the people—in

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204. 16 Stat. 140 (1870). Although the Enforcement Act was the first major piece of federal election legislation, the earliest congressional use of its Article I, § 4 power to regulate elections was the Apportionment Act of 1842, ch. 14, 5 Stat. 491 (1842), which required representatives to Congress to be elected within their states by district, rather than at-large. *Id.*, § 2.

205. U.S. CONST. amend. XV, § 1.

206. Enforcement Act of 1870, ch. 14, §§ 1-6, 16 Stat. 140-41.

this case, whites—are not truly representative, and are therefore of possibly suspect legitimacy.

The same is true when citizens are permitted to cast votes, but their votes are discarded. Under a Lockean system of popular sovereignty, the government does not permit people to go to the polls to make them feel good; it lets them go to the polls because it needs to know whom those people wish to appoint as their agent. An election in which votes are discarded (or miscounted or diluted through ballot box stuffing) fails adequately to consult those who must be consulted if the election result is to be meaningful, and fails to apply the previously agreed upon criterion of majority rule to the actual expressed preferences of the people. Laws that prohibit these practices attempt to make elections more accurate reflections of society's preferences and consent, thereby enhancing the legitimacy of the elected government.

The Enforcement Act's prohibitions on violence and intimidation work identically insofar as violence and intimidation are directed at keeping eligible voters from participating in the electoral process. The Act's prohibitions also apply, however, to instances in which a voter is intimidated, not into abstaining from voting but into casting a vote against his true wishes. The choice by Congress to prohibit this practice can be seen as expressing a legislative judgment that votes cast under the influence of physical intimidation are somehow improper—that they do not "count" in the right way, and that elections won on the basis of votes extracted under physical duress do not truly reflect the consent of the people. To prohibit such practices, then, is to make possible the casting of votes that in some vital sense express the true preferences of the electorate. These prohibitions ensure that electoral outcomes more accurately reflect the consent of all the governed rather than the most violent subgroup of the governed. The same is true of the Enforcement Act's prohibition on bribery. A bribed vote in Congress' judgment no more expresses the type of consent required for legitimate elective government than does a physically coerced vote. Again, the prohibition of vote-buying can be seen as improving the accuracy of electoral outcomes by making them more accurately reflect the true preferences of the people, unimpaired by any form of duress.[207]

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207. Of course, a bribed vote does express a voluntary preference of a sort—a decision to vote for a particular candidate for purposes of financial gain—but even so, Congress has rejected bribed votes as the basis for a proper election result. *See* MADISON, NOTES OF DEBATES, *supra* note 74, at 402-03 (Gouverneur Morris, Aug. 7, 1787) ("Give the votes to people who have no property, and they will sell them to the rich who will be able to buy them. . . . The man who does

Subsequent federal election laws of the Newtonian variety fall into the same general pattern. The Force Act of 1871 strengthened the Enforcement Act by forbidding the use of force and violence with respect to voter registration, and established a mechanism for federal supervision of polling places.[208] The Ku Klux Act of 1871 prohibited conspiracies designed to deprive individuals of, or hinder them in the exercise of, their right to vote.[209] The Repeal Act of 1894[210] repealed most of the measures enacted in the Enforcement Act and Force Act, but several were restored in the Corrupt Practices Act of 1925.[211] In 1940, Congress passed the Hatch Act, which, among other things, put a new twist on attempts to eliminate duress in the voting process by prohibiting incumbents from using their powers over political patronage to require electoral and campaign support from government employees.[212] Finally, the Voting Rights Act of 1965 enacted in greatly strengthened form similar prohibitions on election fraud and exclusionary practices aimed at disenfranchising black voters.[213] By stressing free participation in elections and the elimination of all types of voting fraud, all of these laws can be seen as congressional attempts to enhance the accuracy of electoral outcomes and, by implication, to enhance governmental legitimacy.

2. *Legislative History*

It would be an exaggeration to contend that the laws described above were justified by Congress on the ground that they enhanced electoral accuracy or governmental legitimacy. For the most part, the legislators who passed these laws had many other concerns;[214] in fact,

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not give his vote freely is not represented. It is the man who dictates the vote.").

208. The Force Act, ch. 99, 16 Stat. 433 (1871).

209. Ku Klux Act, ch. 22, 17 Stat. 13 (1871).

210. Repeal Act, ch. 25, 28 Stat. 36 (1894).

211. Corrupt Practice Act, Pub. L. No. 506, tit. III, 43 Stat. 1053, 1070 (1925).

212. Hatch Act, Pub. L. No. 252, 53 Stat. 1147 (1940).

213. Voting Rights Act, Pub. L. No. 89-110, 79 Stat. 437 (1965).

214. The Civil War constitutional amendments and enforcing legislation were considered against a backdrop of concern to grant to blacks a great assortment of advantages which they had previously been denied, including freedom from physical restraint, U.S. CONST. amend. XIII, citizenship, *id.* amend. XIV, § 1, the right to equal treatment and due process, *id.*, and political rights, *id.* amend. XV. These advantages have ever since been grouped collectively in American discourse under the rubric of "civil rights." While the different types of civil rights are similar in many ways, the now well-established practice of using the same term to describe them all has tended to obscure some of the significant differences among them. Most pertinent here is the fact that the right to vote is tied to governmental legitimacy in a republic in a way that the right to due process or equal protection, or even freedom from physical restraint, is not: the former is

most of these legislators seemed to lack, especially with increasing distance from the Revolution, a fully articulated political theory of the Constitution. It is no exaggeration, however, to say that from time to time individual legislators expressed an awareness of the Lockean consequences of election reform legislation, and appealed to notions of popular sovereignty to support such legislation.

For example, during the debates over the Enforcement Act of 1870, Senator Carl Schurz of Missouri made the following argument in favor of its adoption:

> What is true self-government? . . . True self-government consists in a political organization of society which secures to the generality of its members, that is to say, to the whole people, and not to a part of them only, the right and the means to cooperate in the management of their common affairs, either directly, or, where direct action is impossible, by a voluntary delegation of power. It ceases to be true self-government as soon as the powers of government are conferred as an exclusive privilege on one portion of the people and is withheld from the rest. And how is self-government exercised? By the right of suffrage.[215]

Senator Schurz's argument relies on a considerably Lockean framework of popular self-rule through elections by the people. His notion that exclusion of a portion of the people—i.e., blacks—from participation in elections threatens self-government is in accord with the Lockean idea that governmental legitimacy depends upon the consent of the governed.

An even more explicitly Lockean sentiment was expressed the following year during debates on the Force Act of 1871. Representative John Churchill of New York, the bill's sponsor, explicitly argued that the bill was necessary to enhance the accuracy of election results at federal elections:

> [T]he Government of the United States was founded upon . . . the principle that government depends upon the will of the governed; in other words, that the will of the majority . . . when that will can be ascertained, is the proper law of the country. The whole value, the whole moral force of this principle depends, however, upon the question whether or not, after the election shall be held, the peo-

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always essential in some degree to the appointment of an agent preferred by the members of society, *see supra* text accompanying notes 105-26, whereas the latter are choices concerning the scope of governmental power that may differ from society to society. *Cf.* Reynolds v. Sims, 377 U.S. 533, 562 (1964) (right to vote is guarantor of other rights). One wonders whether these differences would have been more apparent to legislators had the extension to blacks of the right to vote been considered separately from the extension of other civil rights.

215. 1 STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS 477 (B. Schwartz ed. 1970).

> ple believe that the result of the election, as declared by the authorities who preside over it, expresses truly the wishes of the majority of the people.
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> . . . .
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> . . . [F]or some years past grave doubts have prevailed in different portions of this country as to whether the declared results of elections have truly expressed the will of the people. . . . [T]he Constitution reserved to Congress to determine the manner in which elections shall be held, and thereby to insure that the result, when declared, shall be the real will of the majority of the people.[216]

A similar defense of both the Enforcement Act and the Force Act was made in 1894 when, after decades of Republican control, Democrats regained control of Congress and repealed much of the fifteenth amendment enforcement legislation. Representative Marriott Brosius of Pennsylvania, a leading Republican opponent of the repeal, made a lengthy and passionate speech on the House floor:

> [T]hat governments derive their just powers from the consent of the governed is a proposition which expresses the only reason for the existence of our form of government. . . . [A]ny civil polity or mode of administration which lodges power anywhere against the consent of the people gives birth to an unjust power, and to that extent is a subversion of our form of government.
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> . . . [C]onsent, to be effective, must be expressed. We have no mode in this Government of determining questions . . . [except by number]. . . . [W]e can only count, and the tally decides. The agency by which consent is ascertained is suffrage. Here, then, are the two pillars upon which our Federal Government was erected—"consent," the supreme determining power, and "suffrage," its constitutional mode of expression. . . . [A]ny abuse or usurpation that overawes or suppresses the one or impairs the purity or efficacy of the other is equally subversive of our system of government, and equally fatal to constitutional liberty.
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> . . . .
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> . . . In forms of government in which sovereignty resides in the people and speaks through popular elections, a free ballot and a fair count are the very breath of the nation's life; and any abuse or fraud which hinders the free expression of the sovereign will at the ballot box gags the nation while highwaymen rob it of its liberty.[217]

This is a clear and strong expression of a view linking clean election laws to the accuracy of electoral outcomes, and linking electoral outcomes, in turn, to the expression of popular consent and governmental legitimacy.

The legislative history of the Voting Rights Act of 1965 contains similar expressions. Senator Everett Dirksen, a sponsor of the bill, opened the Senate debate on the legislation with a speech in which he

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216. *Id.* at 565.
217. *Id.* at 816, 817, 820.

asked: "How then shall there be government by the people if some of the people cannot speak? How obtain the consent of the governed when a segment of those governed cannot express themselves?"[218] He went on to argue that the proposed Voting Rights Act would solve this problem by assuring that the voice of blacks would be heard at the polls.[219] In addition, eight Republicans on the House Judiciary Committee filed a report expressing similar sentiments. "Fundamental to our democracy," they said, "is the right of each qualified citizen to participate in the selection of those who will serve him as his government."[220] They opposed the bill, however, because, in their view, it had the potential to permit voting by ineligible individuals. This, they said, is dangerous because it would "create a mechanism which could well mean the election of [an] official . . . who has failed to receive the largest number of votes cast by legally qualified electors."[221]

3. *Judicial Interpretations: Electoral "Purity" and the "Free" Vote*

The Supreme Court has had occasion to review much of the Newtonian federal election legislation aimed at preventing electoral fraud and abuse. The Court's decisions are significant in two respects. First, the Court has shown little hesitation in upholding such laws, at least to the extent that they regulate elections to federal office.[222] Second, although the Court has never grounded an opinion upholding election legislation on an explicitly Lockean theory of popular sovereignty or electoral accuracy, it has on several occasions made arguments that have a distinctly Lockean ring.

One of the earliest such decisions, and possibly the one most strongly supportive of the congressional power to regulate elections, is *Ex parte Yarbrough*.[223] Yarbrough, a member of the Klan,[224] was con-

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218. 2 STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS 1511 (B. Schwartz ed. 1970).

219. *Id.* at 1512-14.

220. H.R. REP. NO. 439, 89th Cong., 1st Sess. 37, *reprinted in* 1965 U.S. CODE CONG. & ADMIN. NEWS 2437, 2465.

221. H.R. REP. NO. 439, 89th Cong., 1st Sess. 37, 41, *reprinted in* 1965 U.S. CODE CONG. & ADMIN. NEWS 2437, 2469.

222. The Court struck down several provisions of the Enforcement Act on the ground that they purported to reach exclusively state elections to state offices. *See* James v. Bowman, 190 U.S. 127 (1903); *accord* Lackey v. United States, 107 F. 114 (6th Cir.), *cert. denied*, 181 U.S. 621 (1901). The Court declined to read the provisions at issue narrowly to apply only to elections at which a federal office was at stake.

223. 110 U.S. 651 (1884).

victed under the Enforcement Act of beating a black man who was attempting to vote at a Georgia congressional election. Yarbrough sought to have his conviction overturned on the ground that the provision under which he was convicted exceeded congressional authority. The Court viewed this argument with great skepticism:

> That a government whose essential character is republican, whose executive head and legislative body are both elective, whose most numerous and powerful branch of the legislature is elected by the people directly, has no power by appropriate laws to secure this election from the influence of violence, of corruption, and of fraud, is a proposition so startling as to arrest attention and demand the gravest consideration.[225]

After reviewing congressional exercises of the power to regulate elections under article I, section 4, the Court turned to the provisions at issue, which it characterized as "additional laws for the free, the pure, and the safe exercise of this right of voting."[226] Yarbrough argued, among other things, that Congress could not punish violence directed at a voter because its interest in protecting an individual's vote was insufficient—far less, for example, than its interest in protecting a federal election official acting in the course of his duties. The Court rejected this argument, denying that the need to protect the election from violence arises exclusively from the need to protect individuals from physical harm. Instead, the Court said, the regulation of elections also serves broader societal needs:

> [I]t is the duty of . . . [the United States] government to see that . . . [the voter] may exercise this right freely, and to protect him from violence while so doing, or on account of so doing. This duty does not arise solely from the interest of the party concerned, but from the necessity of the government itself, that its service shall be free from the adverse influence of force and fraud practised on its agents, and that the votes by which its members of Congress and its President are elected shall be the *free* votes of the electors, and the officers thus chosen the free and uncorrupted choice of those who have the right to take part in that choice.[227]

The Court later reiterated this proposition, calling it "essential to the successful working of this government" that elected officials be "the free choice of the people," and concluded with an acknowledgement of

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224. R. CLAUDE, THE SUPREME COURT AND THE ELECTORAL PROCESS 30 (1970).
225. *Ex parte* Yarbrough, 110 U.S. 651, 657 (1884).
226. *Id.* at 662.
227. *Id.* (emphasis in original).

the danger in a republican government of the "temptations to control . . . elections by violence and by corruption."[228]

The Court has generally upheld without difficulty the types of anti-fraud election laws represented by the Enforcement Act, the Force Act, the Corrupt Practices Act and the Voting Rights Act.[229] In many of its opinions, the concepts of "free" votes and "pure" elections resurface in the Court's analysis. For instance, *In re Coy*[230] involved the conviction of an election judge for tampering with poll lists. The Court rejected a challenge to Congress' power to punish election fraud when the fraud was aimed at improperly influencing the election only of state officials, even though candidates for federal offices also were on the ballot. In so holding, the Court not only related federal elections laws to the goal of "pure" elections, but also explicitly viewed the laws as aimed at achieving more accurate electoral outcomes:

> Crimes against the ballot have become so numerous and so serious that the attention of all legislative bodies has been turned with anxious solicitude to the means of preventing them, and to the object of securing purity in elections and accuracy in the returns by which their result is ascertained.[231]

The Court took a similar position in *United States v. Classic*,[232] a case involving the alteration and false counting of primary election ballots. It again rejected a constitutional challenge, this time on the ground that the congressional power to regulate elections did not extend to primary elections.[233] In response to the claim that congressional power was restricted by article I, section 4 to general elections, the Court stated: "That the free choice by the people of representatives in Congress . . . was one of the great purposes of our constitutional scheme of government cannot be doubted."[234] And in *Reynolds v. Sims*,[235] the Court struck down a discriminatory redistricting plan, noting, in somewhat Lockean language, that "As long as ours is a representative form of government, and our legislatures are those instruments of govern-

228. *Id.* at 666.

229. *E.g.*, South Carolina v. Katzenbach, 383 U.S. 301 (1966); United States v. Wurzbach, 280 U.S. 396 (1930); *Ex parte* Yarbrough, 110 U.S. 651 (1884); *Ex parte* Clark, 100 U.S. 399 (1879); *Ex parte* Siebold, 100 U.S. 371 (1879); *but see* United States v. Reese, 92 U.S. 214 (1876); United States v. Cruikshank, 92 U.S. 542 (1876).

230. 127 U.S. 731 (1888).

231. *Id.* at 755.

232. 313 U.S. 299 (1941).

233. This question had been reserved in Newberry v. United States, 256 U.S. 232 (1921).

234. United States v. Classic, 313 U.S. 299, 316 (1941).

235. 377 U.S. 533 (1964).

ment elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system."[236]

As a rule, then, the Court has been willing to uphold federal laws prohibiting conduct that undermines what the Court views as free and pure elections. This concept of free and pure elections—by which the Court seems to mean elections conducted without fraud and violence and in which the true choice of the people is identified[237]—is highly reminiscent of Lockean notions of popular sovereignty, and is fully consistent with the Lockean-based view of election law as a guarantor of electoral accuracy and governmental legitimacy.[238]

IV. MODERN ELECTION LAWS

By the end of the 1960s, Congress had provided legislative remedies for the types of electoral abuses that first concerned it nearly a century earlier. The panoply of election laws then in place, the Court observed, banned "sophisticated as well as simple-minded" types of election fraud.[239] Under these laws, no citizen of the United States eligible to vote in a federal election could be kept from the polls by any form of duress, nor could that person's vote be discarded, miscounted or diluted. Elections would work in the way that our society intended them to work: any eligible citizen who wished to participate in the choice of an agent could do so, and the principle of majority rule would be applied uniformly to all the votes recorded.[240] As a result, elections

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236. *Id.* at 562.

237. This concept may have its roots in early state constitutional guaranties of free and equal elections. *See* MASS. CONST. of 1780, § 10; DEL. CONST., Declaration of Rights and Fundamental Rules § 6 (1776); DEL. CONST. of 1792 art. I, § 3; N.H. CONST., Bill of Rights, pt. 1, art. 11 (1783) (all requiring that elections be free or equal, or both). This formulation may in turn echo Locke, *see* J. LOCKE, THE SECOND TREATISE, *supra* note 40, § 158, at 83 (people desire a "fair and equal representative"), and could well be rooted in rationalist notions of free will as reflected in electoral choice. *See generally* J. LOCKE, ESSAY CONCERNING HUMAN UNDERSTANDING, *supra* note 54.

238. *See also* United States v. Classic, 313 U.S. 299, 329-30 (1941) (Douglas, J., dissenting); Anderson v. Celebrezze, 460 U.S. 780, 788, 796-98 (1983); United States v. McBosley, 29 F. 897, 899 (D. Ind. 1886); State v. Jackson, 73 Me. 91, 94 (1881); Gould v. Grubb, 14 Cal. 3d 661, 536 P.2d 1337, 1348, 122 Cal. Rptr. 377, 388 (1975); Cannon v. Justice Court for Lake Valley Judicial Dist., 61 Cal. 2d 446, 39 Cal. Rptr. 228, 232, 393 P.2d 428, 432 (1964); State *ex rel.* Hampel v. Mitten, 227 Wis. 598, 278 N.W. 431, 435 (1938).

239. Harman v. Forssenius, 380 U.S. 528, 540 (1965) (quoting Lane v. Wilson, 307 U.S. 268, 275 (1939)).

240. In many respects, however, Congress has chosen to rely on protections provided by state law. *See* U.S. CONST. art. I, § 4 (Congress has power to alter state election laws). For

would be much more likely than ever before to identify accurately those individuals whom the people, in their sovereign capacity, chose as agents to exercise the enormous powers of government.

Ironically, at about this same time Congress began to perceive other problems with the electoral process. Principal among these problems was the increasing role of money in the conduct of campaigns for federal office. Campaigns, Congress noted, were becoming increasingly expensive, and were being fought more and more in the arena of mass media advertising, a costly practice. As a result, Congress felt, candidates were required to spend inordinate amounts of time raising funds. They were becoming unduly susceptible to the improper influence of large contributors. Most important for purposes of this analysis, Congress came to feel that the expenditure of money had the potential to become an overwhelming determinant of electoral outcomes.

As it had in the past, Congress responded to these concerns with legislation. This legislation, like earlier election legislation, could be characterized as an effort to improve the accuracy of electoral outcomes and to protect governmental legitimacy, and might have been expected to encounter no more resistance from the Court than had similar legislation already on the books. But the new breed of election laws were different in a significant respect: they tended to regulate either speech itself, or conduct intimately related to speech. Consequently, despite the similarity of purpose among the Newtonian and modern variety of election laws, the Court handled the new legislation very differently, declaring law after law unconstitutional under the first amendment.

A. The New Legislation

The most significant legislation directed at the problem of money in the electoral process was the Federal Election Campaign Act (FECA).[241] A comprehensive legislative effort, FECA set limits on the amount that an individual could contribute to candidates for federal office, on the amount that individuals could spend independently on behalf of candidates, and on overall campaign spending by candidates for federal office. In addition, FECA required public disclosure of cam-

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example, Congress has never enacted a comprehensive federal election code regulating the details of voting methods.

241. Pub. L. No. 92-225, 86 Stat. 3 (1971), as amended by Pub. L. No. 93-443, 88 Stat. 1263 (1974) (codified as amended at 2 U.S.C. §§ 431-456 (1982) and in scattered sections of 18 U.S.C. and 47 U.S.C.).

paign contributions and expenditures, created a system of public financing of presidential campaigns, and established the Federal Election Commission to oversee and enforce the legislation.[242]

Congress advanced a variety of justifications for FECA. Among these were the prevention of "quid pro quo corruption"—the repayment of large campaign contributions with political or legislative favors by successful candidates—and the preservation of public confidence in government and in the electoral and political processes.[243] Yet an equally important congressional purpose was to prevent what Congress felt amounted to the buying and selling—or at least the public perception of buying and selling—of federal offices, not through the medium of direct bribes to voters, but through massively financed campaigns and political advertising. Thus, a congressional report supporting campaign finance reform criticized existing election laws as "embodying out-of-date remedies for today's problems in the conduct of elections for Federal office."[244] What was needed, the report said, was legislation addressing the widespread perception "that a candidate can buy an election by spending large amounts of money in a campaign."[245] Another report, after documenting the increasing costs of campaigns for federal office, stated bluntly: "Such costs and expenditures have been escalating so as to threaten to make money the principal determinant of election to such offices."[246]

But unlike old-fashioned bribery, in which candidates actually bought elections by paying the electorate to vote for them, this modern form of election-buying was thought to work differently, through an improper form of persuasion akin to that used to sell products in an age of media advertising campaigns. For example, a report accompanying an early version of the bill that became FECA claimed:

> This will make possible parity of exposure on [mass] media as between candi-

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242. Some elements of the Federal Election Campaign Act, such as contribution limitations, had been enacted previously in some specific contexts. *See, e.g.*, Corrupt Practices Act of 1925, § 313, 43 Stat. 1070, 1074 (1925) (ban on political contributions by banks and corporations). The Federal Election Campaign Act, however, went far beyond these early efforts, and was the first such statute to undergo judicial review under the first amendment. *Cf.* United States v. Congress of Indus. Organizs., 335 U.S. 106 (1948).

243. Buckley v. Valeo, 424 U.S. 1, 25-27 (1976) (per curiam).

244. H.R. REP. No. 564, 92d Cong., 2d Sess. 3 (1971).

245. *Id.* at 4. *See also* H.R. REP. No. 1239, 93d Cong., 2d Sess. 3 (1974) ("Under the present law the impression persists that a candidate can buy an election by simply spending large sums in a campaign.").

246. H.R. REP. No. 565, 92d Cong., 2d Sess. 4 (1971).

> dates competing for the same Federal elective office. Thus, such candidates will be competing for the votes of the electorate on their merits rather than on the basis of exposure as in the case of such commodities as toothpaste, soft drinks and beer, aspirin and razor blades.[247]

Another report stated similarly:

> The electorate is entitled to base its judgment on a straightforward presentation of a candidate's qualifications for public office and programs for the Nation rather than on a sophisticated advertising program which is encouraged by the infusion of vast amounts of money.[248]

These comments were echoed frequently during the floor debates on FECA. Senator Muskie, for example, claimed that "millions are spent to sweep men into office on a wave of superficial advertising more appropriate to soap or cereal than national politics."[249] Representative Madden likewise defended the legislation as necessary "so that the minds of the American voters are not high-pressured and warped with multi-million-dollar financed political propaganda."[250] In other words, the increasing role of money in campaigns for office had created a situation in which voters, although not subjected to the direct kind of duress exemplified by physical violence or bribery with liquor or cash, were nevertheless put under a form of pressure that invidiously distorted their judgment and improperly affected the outcome of the election.[251]

Congressional passage of FECA touched a resonant chord nationwide, sparking a flurry of state and local legislative activity aimed at reducing the impact of money and the mass media on electoral out-

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247. H.R. REP. No. 565, 92d Cong., 2d Sess. 19 (1971).

248. H.R. REP. No. 1239, 93d Cong., 2d Sess. 3 (1974).

249. 117 CONG. REC. 29,321 (1971).

250. *Id.* at 42,056. *See also id.* at 29,322 (remarks of Sen. Talmadge), 30,072 (Sen. Hart), 42,063 (Rep. Staggers), 42,068 (Rep. Conte), 42,072 (Rep. Thompson), and 42,075-76 (Rep. Ichord).

251. A variety of commentators have reached similar conclusions. *See, e.g.*, Cox, *Foreword: Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1, 55-70 (1980); Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609 (1982); Shockley, *Direct Democracy, Campaign Finance, and the Courts: Can Corruption, Undue Influence, and Declining Voter Confidence Be Found?*, 39 U. MIAMI L. REV. 377 (1983); Forrester, *The New Constitutional Right to Buy Elections*, 69 A.B.A.J. 1078, 1080 (1983); Carter, *Technology, Democracy, and the Manipulation of Consent* (book review), 93 YALE L.J. 581 (1984); Wald, *Two Unsolved Constitutional Problems*, 49 U. PITT. L. REV. 753, 753-759 (1988); Ashdown, *Buying Speech: Campaign Spending, the New Politics, and Election Law Reform*, 23 NEW ENG. L. REV. 397 (1988); Nichol, *Money, Equality and the Regulation of Campaign Finance*, 6 CONST. COMM. 319 (1989).

comes. Within a few years, fourteen states had established some form of public financing for state or local elections.[252] By 1978, more than thirty states had legislatively restricted corporate political activities.[253] For example, Massachusetts passed a law prohibiting corporations from spending money to influence ballot measures,[254] and Berkeley, California, passed an ordinance limiting campaign contributions to groups advocating or opposing ballot measures.[255] A more recent, related development has been legislative concern with the practice of election-day media projections made before the close of the polls. These projections are thought to distort elections by deterring people from voting later in the day because voters are made to feel that their votes will not affect the election results. In response to this problem, the State of Washington prohibited exit polling on election day,[256] and Congress has explored the possibility of establishing a uniform hour of poll closing in national elections.[257] Most recently, legislation has been introduced in Congress to require presidential candidates who accept public funds to engage in a series of meaningful televised debates.[258]

B. Enhancement of Accuracy

Like Newtonian election laws banning violence, bribery, voter impersonation and the like, these money- and media-oriented laws can be viewed as legislative attempts to enhance the accuracy of electoral outcomes and, by implication, the legitimacy of the elected government. Consider the practice of media projections based on exit polls. Data gatherers interview a scientifically selected sample of voters emerging from polling places to determine how they voted. This information is then processed through a model of the electorate's voting patterns, creating a set of statistics from which election results can be predicted. At some point in the day, the operators of the model may feel sufficiently

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252. Haughee, *The Florida Election Campaign Financing Act: A Bold Approach to Public Financing of Elections*, 14 FLA. ST. U.L. REV. 585, 586-87 (1986). The total had risen to 23 states and the District of Columbia by 1986. *Id.* at 587.

253. First Nat'l Bank v. Bellotti, 435 U.S. 765, 803 (1978) (White, J., dissenting).

254. *Id.*

255. Citizens Against Rent Control v. Berkeley, 454 U.S. 290 (1981).

256. Daily Herald Co. v. Munro, 838 F.2d 380 (9th Cir. 1988).

257. *See* S. 182, 100th Cong., 2d Sess., 134 CONG. REC. S11, 818 (daily ed. Sept. 13, 1988).

258. S. 725, 101st Cong., 1st Sess., 135 CONG. REC. S6042 (daily ed. June 1, 1989); H.R. 1733, 101st Cong., 1st Sess., 135 CONG. REC. H980 (daily ed. April 6, 1989); *see* Markey & Graham, *Putting Their Mouths Where the Money Is*, N.Y. Times, July 19, 1989, at A23, col. 2.

confident to offer a prediction. This prediction is then broadcast over radio and television, often hours before the polls are scheduled to close. Consequently, many people who intend to vote, but who have not had a chance to do so, may learn who "won" the election, creating a danger that some voters will simply skip voting altogether on the theory that it is too late for their vote to make any difference.[259]

Several different types of problems may surface due to such voter abstention. First, of course, the pollsters can be wrong; one thinks of the famous gaffe headline of the *Chicago Tribune*, "Dewey Wins." If the pollsters turn out to be wrong, the deterrence of late votes can indeed influence the result of the election. Second, even if the projections prove correct with respect to races in which projections are made, such projections can deter voters from voting in other races, particularly local races and contests for lesser offices where no projection has been or will be made. Critics of media projections claim that this actually happened during the November 1980 election when Ronald Reagan was "declared" the winner on the basis of exit polling in eastern states at so early an hour that many voters in western states decided not to vote, thereby influencing the outcome of many state and local races.[260] Third, the practice of predicting winners, even if it never affects the results of any election, can lower voter participation. Lower participation has the potential, at least in a society demanding a high degree of accuracy in its election results, to detract from the legitimacy of the elected government.[261] Viewed in this light, the decision of the Washington legislature to adopt an exit-polling ban can be said to reflect a legislative judgment that the dangers to governmental legitimacy posed by media projections are sufficient to justify legislative intervention.[262]

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259. *See generally* DuVal, *The Occasions of Secrecy*, 47 U. PITT. L. REV. 579, 659-62 (1986); Comment, *Restricting Election Day Exit Polling: Freedom of Expression vs. the Right to Vote*, 58 U. CIN. L. REV. 1003 (1990); Comment, *Clearing* CBS, Inc. v. Smith *From the Path to the Polls: A Proposal to Legitimize States' Interests in Restricting Exit Polls*, 74 IOWA L. REV. 737 (1989); Note, *Exit Polls and the First Amendment*, 98 HARV. L. REV. 1927 (1985); Note, *Curtailment of Early Election Predictions: Can We Predict the Outcome?*, 36 U. FLA. L. REV. 489 (1984).

260. *See* DuVal, *supra* note 259, at 659-62; Prochnau, *Angered California Voters May Attempt to Beat the Clock in 1984*, Wash. Post, Nov. 11, 1980, at A5, col. 1; Monday Night Voting, Wash. Post, Nov. 13, 1980, at A22, col. 1.

261. An additional ill effect might be the creation of the damaging impression that elections are determined by a tiny percentage of the voters, an impression that runs directly counter to the theory of popular sovereignty and has the potential to reduce public confidence in government, an interest the Supreme Court has found quite important. *E.g.*, Buckley v. Valeo, 424 U.S. 1, 27 (1976) (per curiam).

262. This was determined by the federal courts to have been at least one legislative purpose.

Similarly, FECA and other campaign finance legislation can be viewed at least in part as efforts to enhance the accuracy of electoral outcomes. In one sense, the legislation can be seen merely as an attempt to ban what is, at bottom, a form of election-buying no different from treating or outright bribery. The legislative goal in all such cases is to prevent conditions from arising in which elections are won through the pure and simple expenditure of money. Alternatively, campaign finance reform can be seen as a legislative rejection of the constitutional sufficiency of electoral consent that is based on votes responsive to subliminal advertising rather than to substantive judgments by citizens.[263]

To characterize these laws as an enhancement of electoral accuracy is not by any means to suggest that they are, without more, constitutionally permissible. On the contrary, the analysis only begins here. Many questions must first be answered. For example, what type of electoral consent did the people of the United States feel would be adequate when they adopted the Constitution as their charter of self-government? Was Congress correct in thinking when it enacted FECA that voting decisions based on subliminal advertising are less desirable than those based on reflection, and that an election won on the basis of such votes might be of suspect legitimacy? Or does the constitutional requirement that the people "choose" their agents mean only that they need cast their votes free from direct and obvious duress? If the Constitution is ambiguous on that point, might it nevertheless grant to Congress the power to take a cautious approach toward practices that have the potential to impair governmental legitimacy? Or is legitimacy too important to leave to speculative congressional tinkering, and thus a matter reserved entirely to the people?

Similar questions may be asked in the more specific case of exit-polling. The Constitution manifests popular consent to be governed by a Congress composed of elected representatives. Would it make any difference to the people's consent if senators and representatives elected in the east were to win their seats through elections in which turnout was much heavier than for congressional elections in the west due to deterrence caused by early media projections? Although we seem to take for granted that the Constitution does not require full voter participation to confer a presumption of legitimacy on the winner of an election, might it nonetheless require some minimum level of participation?

See Daily Herald Co. v. Munro, 838 F.2d 380, 387 (9th Cir. 1988).

263. *See* P. PARTRIDGE, *supra* note 54, at 32 (#2).

And are all causes for citizen abstention from the process of choosing agents equal in the eyes of the United States (or Washington State's) Constitution?

The Supreme Court has failed to address any of these questions in deciding the constitutionality of modern election laws. Instead, the Court has ignored the legitimacy side of the equation. Apparently abandoning or finding inapplicable its historical commitment to "free" and "pure" elections, the Court has analyzed these cases within a narrow first amendment framework. In so doing, the Court has developed an unfortunate first amendment doctrine that all but precludes consideration of important questions about government legitimacy.

C. Judicial Treatment of Modern Election Laws

Unlike the earlier Newtonian election laws, which generally passed rather easily through Supreme Court review, the new breed of election laws encountered immediate trouble. In *Buckley v. Valeo*,[264] the first judicial test of FECA, the Court struck down several important aspects of the law, including limits on independent campaign expenditures by individuals on behalf of candidates, and limits on the amount candidates could spend on themselves in running for office.[265] The Court rested its decision on first amendment grounds, reasoning that the restriction of money intended for use as political speech was tantamount to the restriction of political speech itself. In reaching its ruling, the Court rejected as a justification for FECA's limitations on independent and candidate expenditures the notion that equalizing campaign spending would ameliorate the problem of rich candidates overwhelming their poorer rivals through the purchase of vast amounts of media advertising. "[T]he concept," the Court said, "that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."[266] This formulation has been the cornerstone of the Court's subsequent jurisprudence concerning the constitutionality of election laws that restrict speech or the money used to buy speech.

As noted above, FECA can be seen as an attempt to enhance the accuracy of electoral outcomes by prohibiting election-buying through

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264. 424 U.S. 1 (1976) (per curiam).

265. *Id.* at 39-59. The Court, [however,] upheld a variety of limitations on political contributions, *id.* at 23-38, and certain reporting and disclosure requirements. *Id.* at 60-84. The Court also upheld a system of public financing of presidential elections. *Id.* at 85-109.

266. *Id.* at 48-49.

one-sided campaign expenditures, or, alternatively, by attempting to reduce the extent to which electoral outcomes turn on insubstantial voting decisions by citizens subject to massive political advertising campaigns. If one takes this view of FECA and similar laws, the Court's interpretation of the first amendment in *Buckley* deals a devastating blow to this particular variety of electoral fine-tuning because it depends quite directly on restricting the speech of some political actors so as not to drown out the speech of others, to use the Court's analytical framework.

Not surprisingly, other laws predicated on the same theory have met similar fates under the Court's first amendment jurisprudence. In *First National Bank v. Bellotti*,[267] the Court applied its rejection of the "drowning out" theory of campaign finance reform to a law barring independent expenditures by corporations concerning referenda. The Court struck down the law as a violation of the first amendment. In *Citizens Against Rent Control v. Berkeley*,[268] the Court used the same reasoning to strike down a law restricting contributions to groups advocating or opposing ballot measures. In *Federal Election Commission v. National Conservative Political Action Committee*,[269] the Court likewise struck down a federal law restricting independent expenditures by political action committees. And in *Meyer v. Grant*,[270] the Court struck down a Colorado law prohibiting the use of paid circulators of political initiative petitions. The state justified the law partly on the ground that it equalized political opportunity of rich and poor advocates of ballot initiatives.[271]

The Court has so emphatically rejected any possibility of government limitations on independent expenditures by individuals or corporations that the focus of constitutional debate has shifted to the constitutionality of *any* type of government regulation of independent expenditures, even those that do not impose any limit on the amount of money that a corporation (much less an individual) may spend to advocate the election of a candidate for public office. In *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*,[272] the Court held unconstitutional the application of a modest regulatory scheme involv-

267. 435 U.S. 765 (1978).
268. 454 U.S. 290 (1981).
269. 470 U.S. 480 (1985).
270. 486 U.S. 414 (1988).
271. *Id.* at 426 n.7.
272. 479 U.S. 238 (1986).

ing a variety of accounting, reporting and disclosure requirements to a nonprofit corporation chartered for the purpose of advocating a political viewpoint. On the other hand, in *Austin v. Michigan Chamber of Commerce*,[273] the Court upheld the application of virtually identical provisions of a Michigan election law to a nonprofit corporation whose purposes were primarily economic rather than political.[274] In an unusual departure, the Court frankly recognized what it called "the corrosive and distorting effects of immense aggregations of wealth" on the political process,[275] prompting high-pitched dissents from Justices Scalia and Kennedy accusing the majority of repudiating *Buckley*'s response to the "drowning out" theory.[276] The context of the decision, however, makes clear that the majority thought itself to be doing nothing more than applying *Buckley* in the specialized context of corporate spending.[277]

The lower courts have applied the Supreme Court's first amendment analysis with similar results. For example, in *Daily Herald Co. v. Munro*,[278] the Ninth Circuit struck down the previously mentioned Washington exit-poll ban. Apparently, it was so obvious to Washington State's lawyers that the case fell within adverse Supreme Court precedent that they denied that the purpose of the statute had anything to

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273. 110 S. Ct. 1391 (1990).

274. *Id.* at 1395.

275. *Id.* at 1397.

276. *See id.* at 1410 (Scalia, J., dissenting); *id.* at 1420 (Kennedy, J., dissenting).

277. The majority specifically rejected the dissenters' contention that the law under review involved an attempt "to equalize the relative influence of speakers on elections," *id.* at 1397-98, the feature of FECA that the Court so explicitly condemned in *Buckley*. 424 U.S. at 48-49. Rather, the majority said, the law "ensures that expenditures reflect actual public support for the political ideas espoused by corporations." *Austin*, 110 S. Ct. at 1398; *cf.* Federal Election Comm'n v. Massachusetts Citizens for Life, Inc. 479 U.S. at 257-59. In the same paragraph, however, the majority held that "the unique state-conferred corporate structure that facilitates the amassing of large treasuries warrants" the law's application to corporations because they can "unfairly influence elections when [that wealth] is deployed in the form of independent expenditures." *Austin*, 110 S. Ct. at 1398. It is this language that the dissenters pounced on as implicitly repudiating *Buckley*, and the majority, although vague at critical points in its discussion, certainly does little to dispel the impression that what is bad about corporate spending is the ability of corporations to outspend individuals in the marketplace of ideas—precisely the justification for government interference in the laissez-faire political marketplace that the Court rejected in *Buckley*, *Belotti*, and subsequent cases. Nevertheless, it seems clear enough from the narrow context of the Court's opinion and its direct reaffirmation of *Buckley* both here and in other recent cases, *see, e.g.*, Meyer v. Grant, 486 U.S. 414, 428 (1988), that the rejection of the "drowning out" theory is still quite safely ensconced in the Court's election law jurisprudence.

278. 838 F.2d 380 (9th Cir. 1988).

do with restricting advance media projections of election winners,[279] surely the only remotely sensible basis for the legislation. Nevertheless, the district court found this to be the true purpose of the law, and the court of appeals, assuming such a purpose, found it constitutionally "impermissible."[280] Thus, the first amendment has now been invoked not only to defeat an election regulation designed to enhance electoral accuracy, but to eliminate altogether the enhancement of electoral accuracy and governmental legitimacy as permissible grounds for any election law when that law touches anything that the Supreme Court defines as speech.[281]

D. Free Speech and the Lockean Constitution: Toward a Judicial Approach to Modern Election Laws

The Supreme Court's approach in these cases is seriously flawed. This is true not so much because of the results it has reached—though the results are disturbing indeed to those who view unrestricted campaign expenditures as a serious taint of the electoral system—but because of the Court's complete failure to consider the benefits modern elections laws were thought to have for electoral accuracy and for what the Court had previously called "free" and "pure" elections. If congressional critics of election campaign tactics were correct, those tactics represented a potentially serious threat to popular sovereignty. Government by the rich, or by the media, is not popular self-government, and it is hardly intuitively clear why we should interpret the Constitution to permit election laws designed to prevent government by whites over blacks, but not to prevent government by the well-funded over the less-well-funded, or by the media-connected over the media-unconnected.

In this section, I shall invoke the Lockean theory of popular sovereignty one last time to outline two approaches the Court could take to better accommodate the interests implicated by modern election laws.

1. The First Amendment in Lockean Perspective: Two Views

As we have seen, the Lockean theory of popular sovereignty states that the people are free to structure their government as they see fit,

279. *Id.* at 387. The state insisted that the purpose of the statute was to prevent disruption of the polling place, an interest found by the court to be inadequately served by the statute. *Id.* at 385.

280. *Id.* at 387.

281. *See also* Mills v. Alabama, 384 U.S. 214 (1966) (striking down ban on election day political endorsements by newspapers).

and to delegate to their governmental agents as much or as little power as they wish those agents to exercise. In the particular system of popular instructions to government that makes up our Constitution, there can be no doubt that the first amendment occupies an important place. The sheer sweep of the amendment's ban on governmental abridgement of speech, an activity that touches almost every aspect of daily life, inevitably renders the first amendment a significant constraint on the exercise of governmental power.

Deciding how to resolve conflicts between laws implementing legitimate government interests and the first amendment's expressed preference for free speech is difficult enough under any circumstances; the problem takes on an added dimension when the government interest at stake is as fundamental to our political system as the maintenance of governmental legitimacy. A further complication arises from the fact that the first amendment is sometimes thought to be designed to achieve goals closely related to legitimacy and popular sovereignty, but is also sometimes thought to be aimed at entirely different social objectives.

The Lockean theory outlined earlier suggests at least two ways to address these conflicts in the context of modern election laws. I shall call these alternatives, respectively, strong Lockeanism and weak Lockeanism.

a. Strong Lockeanism

Strong Lockeanism, as I shall use the phrase here, signifies an approach to constitutional interpretation that focuses on the fundamental role of popular sovereignty and governmental legitimacy in our system of government. Strong Lockeanism, recognizing the great importance of popular sovereignty and governmental legitimacy, makes those values the basis for an inference that the Constitution must generally be construed to advance their achievement. The strong Lockean thus approaches a problem of constitutional interpretation with the inclination either to interpret the particular constitutional provision in question to be consistent with the promotion or maintenance of governmental legitimacy, or, if such an interpretation is impossible, to resolve conflicts between constitutional commands in a way that favors legitimacy because of its importance in the constitutional scheme.

Before examining the contours of a strong Lockean approach to the first amendment, I would like to be clear about what such an approach would *not* involve. In its most extreme form, strong Lockeanism

might suggest the hard-line position that popular sovereignty and legitimacy are the most important constitutional values, bar none; that every provision of the Constitution must be read as subservient to those ends; and that all other values without exception yield in a conflict, regardless of the circumstances. This "Godzilla" approach, however, in which the pursuit of governmental legitimacy tramples everything in its path, would be both unreasonable and unjustifiable even within the bounds of the Lockean theory of popular sovereignty. First, the people, as they make clear in the preamble to the Constitution, have other aspirations besides the achievement of legitimate self-government, aspirations which they would probably be unwilling to sacrifice in some single-minded pursuit of a state of perfect self-rule. For example, just because stealing ballots threatens governmental legitimacy does not necessarily mean that the people would be willing to tolerate warrantless searches aimed at discovering stolen ballots, or the torturing of suspected vote thieves to elicit confessions. Second, popular sovereignty is itself only a means to an end: individuals undertake the burdens and responsibilities of life in organized society in order to live some sort of good life—a life free, at a minimum, from the fear of physical harm and anxiety associated with the state of nature.[282] To elevate legitimacy and popular sovereignty strictly above the achievement of such basic human goals is to confuse the means of attaining such goals with the goals themselves.

To be workable, even a strong Lockeanism must be more reasonable in its approach to resolving constitutional issues. Such an approach might hold that the achievement and maintenance of governmental legitimacy and popular sovereignty are extremely important goals that occupy preferred, though not always dominant, positions in the constitutional scheme. The strong Lockean would accordingly attempt to read constitutional provisions to be consistent with the achievement of popular sovereignty and legitimacy, and would be inclined to resolve disputes in their favor, but would simultaneously attempt to avoid doing violence to the text, or to impede unduly the achievement of competing constitutional values.

Specifically, then, how might a strong Lockean read the first amendment? Unfortunately, the first amendment poses enormous analytical difficulties. Its language is both broad and vague, and the reasons for its adoption, along with the adoption of the rest of the Bill of

282. *See* Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982) (democratic self-government is only a means of attaining individual self-realization).

Rights, remain frustratingly inaccessible due to the lack of pertinent legislative history or other contemporaneous accounts.[283] Nevertheless, scholars and the Supreme Court have advanced several useful competing theories of the first amendment. In one view, the first amendment implements a societal commitment to a "marketplace of ideas" as a vehicle for discovering truth.[284] In another view, the constitutional guarantee of free speech is meant to protect the ability of individual members of society to achieve "self-fulfillment" through speech.[285] A third view holds that free speech serves to "check" governmental excesses.[286] However, the theory of the first amendment that would undoubtedly hold the greatest appeal for the strong Lockean is the view stating that the Constitution protects free speech because free speech is essential to the realization of popular self-government.[287]

According to Alexander Meiklejohn, the principal architect of the self-government theory of the first amendment, the first amendment protects speech because speech is a proxy for "the freedom of those activities of thought and communication by which we 'govern.' "[288] Although the Constitution appears to confine the role of the people in governing themselves to voting in elections,

> in the deeper meaning of the Constitution, voting is merely the external expression of a wide and diverse number of activities by means of which citizens attempt to meet the responsibilities of making judgments, which that freedom to govern lays upon them. . . . Self-government can exist only insofar as the voters acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express.[289]

These qualities, in Meiklejohn's view, are acquired through speech and

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283. *See* M. NIMMER, NIMMER ON FREEDOM OF SPEECH § 1.01 (1984). *See generally* D. FARBER & S. SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 219-252 (1990) (account of the ratification of the Bill of Rights).

284. The classic statement of this idea is that of Justice Holmes in Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

285. *See* M. NIMMER, *supra* note 283, § 1.03 (see cases cited).

286. Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521.

287. *See* A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948); Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 255. *See also supra* notes 89-102 and accompanying text. The checking function theory might also appeal to the strong Lockean insofar as that theory views the employment of speech by the people as a means of exercising a "veto power" over government actions that do not meet with popular approval. Blasi, *supra* note 286, at 542.

288. Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 255.

289. *Id.*

activities associated with speech, such as reading and writing. Thus, the freedom of speech guaranteed by the first amendment is tantamount to the constitutional denial to government of the power "to abridge the freedom of the electoral power of the people."[290]

This analysis fits well into a strong Lockean approach to the first amendment. If the constitutional guarantee of free speech has anything at all to do with governmental legitimacy, it can only be because the first amendment reflects a societal belief in the role of speech in the attainment of legitimacy. Although this proposition need not be true in the abstract—even a government that restricts its citizens' speech can be legitimate if it has the consent of the governed—the linkage between speech and legitimacy takes on considerable force in a republic, where the people exercise an important aspect of their sovereignty at frequent elections.[291] Elections, as indicated previously, are the means by which the people select their agents. Speech can play a significant role in the way such agents are selected: it is implicated in the identification of potential candidates for office and the bringing to public attention of their candidacies, as well as in the processes by which voters inform themselves about and debate the merits of the candidates and their positions for purposes of making electoral choices. As we have seen, the processes by which elections are conducted are intimately linked to governmental legitimacy because electoral procedures and processes can affect the degree to which electoral outcomes accurately reflect the consent of the governed.[292] For the strong Lockean, then, the first amendment is not only consistent with the general constitutional goal of protecting popular sovereignty and governmental legitimacy, but actually protects speech in order to achieve those very goals.

This perceived congruence between the requirements of popular sovereignty and the first amendment makes cases involving modern elections laws rather easy for the strong Lockean. Consider once again the ban on exit polling at issue in *Daily Herald Co. v. Munro*.[293] Assume that the purpose behind the ban was to prevent advance media projections of election winners in order to prevent the deterrence of late voting by voters who may incorrectly think, after hearing such projections, that their votes will make no difference.[294] Whereas the Ninth

290. *Id.* at 256-57.

291. *See supra* notes 105-18 and accompanying text.

292. *See supra* notes 128-53 and accompanying text.

293. 838 F.2d 380 (9th Cir. 1988); *see supra* notes 256-62 and accompanying text.

294. When the government seeks to justify a restriction on speech on the ground that its

Circuit applied Supreme Court doctrine to strike down this law as an impermissible restriction of speech protected by the first amendment, the application of strong Lockeanism would require a different result. The exit poll ban promotes electoral accuracy because it is designed to prevent the skewing of electoral outcomes through the deterrence of late voting—that is, the ban increases the chances that the person who wins the election will be the one in fact preferred by a majority of those citizens who wish to play a role in selecting the winner.[295] Promoting electoral accuracy in turn promotes governmental legitimacy, a highly important, if not paramount, government interest. Although the law doubtless restricts the speech of broadcasters and thus implicates the first amendment, it does not violate the first amendment because the Constitution, for the strong Lockean, should not in general be interpreted in such a way as to prevent the achievement or promotion of legitimacy. In this case, moreover, such an interpretation is quite natural because, under the self-government theory, the first amendment protects speech for the very purpose of protecting governmental legitimacy and the popular sovereignty on which it rests. As a result, the law survives constitutional scrutiny from the perspective of strong Lockeanism.

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effect on speech is merely incidental to the pursuit of some other goal unrelated to the suppression of speech, the Supreme Court has typically required that the restriction advance the non-speech goal with some degree of efficiency or directness. *E.g.*, United States v. O'Brien, 391 U.S. 367 (1968) (law restricting expressive conduct must further a substantial government interest), *reh'g denied*, 393 U.S. 900 (1968). This is a useful requirement, and I assume here that a ban on exit-polls would further the goal of making electoral outcomes as accurate as possible by minimizing the deterrence of late voting that results from early election projections. Presumably these assumptions would be open to challenge in actual litigation over such a law. In some cases, the assumptions underlying federal campaign finance reform laws have been criticized as unrealistic. For example, it has been suggested that the type of reforms contained in the Federal Election Campaign Act have the undesirable effect of entrenching incumbent officials, and thus worsen rather than improve the problems Congress was trying to correct. *See, e.g.*, Romano, *Metapolitics and Corporate Law Reform*, 36 STAN. L. REV. 923, 990-91 (1984); BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 CALIF. L. REV. 1045, 1074-81 (1985). For a variety of views concerning the effects of campaign finance reform, see *Frameworks of Analysis and Proposals for Reform: A Symposium on Campaign Finance*, 18 HOFSTRA L. REV. 213 (1989).

295. In our society, as in others in which voting is not mandatory, *cf. supra* note 156 (examples of compulsory voting laws), elected officials have always been taken to derive their legitimate entitlement to office from having received a majority of votes cast, regardless of whether all citizens actually vote.

b. Weak Lockeanism

Weak Lockeanism, as I shall use the term here, differs from strong Lockeanism in that it focuses not on the importance of popular sovereignty in our system of government—a proposition indisputable for Lockeans of any stripe—but on the concrete ways in which popular sovereignty actually influences the shape of the Constitution and its provisions. For the weak Lockean, the only impact of the theory of popular sovereignty on the Constitution lies in the fact that the Constitution must be viewed as a creation of the people, and therefore as a reflection of their particular preferences for governmental structure and distribution of powers, whatever those preferences may be. The fact that governmental legitimacy is crucial to the maintenance of popular sovereignty does not necessarily suggest, from the perspective of weak Lockeanism, that the people have crafted a Constitution that affords ample protection to the achievement of legitimacy, nor does it furnish any basis for assuming that any particular constitutional provision ought to be taken to advance that goal. For the weak Lockean, each provision of the Constitution simply is what it is, regardless of its consistency with any overarching political theory.

The weak Lockean, then, would try to approach the task of interpreting the first amendment with a good deal of sensitivity and care and, to the extent possible, without excessive ideological baggage. A weak Lockean analysis might take the following form. The first amendment, as noted above, poses formidable interpretational difficulties, and its actual effect, if any, on the original, basic constitutional scheme of government is far from clear. Nevertheless, students of the first amendment seem to agree that its adoption did not represent a sudden national change of course within a mere two years of the ratification of the Constitution. If anything, the Bill of Rights seems to have been intended by its drafters and ratifiers to fulfill and complete the original constitutional plan rather than to alter it.[296] If this interpretation is

296. L. LEVY, CONSTITUTIONAL OPINIONS: ASPECTS OF THE BILL OF RIGHTS 105-06 (1986). The framers of the Constitution deliberately omitted a bill of rights despite considerable popular sentiment to the contrary. Although almost every state had adopted some sort of declaration of rights at the time of the Revolution, *see* 1 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 231-379 (1971), the framers of the federal Constitution viewed a bill of rights as superfluous: "why declare that things shall not be done which there is no power to do?" asked Hamilton. THE FEDERALIST, No. 84, at 513 (A. Hamilton) (C. Rossiter ed. 1961). Moreover, they feared that the inclusion of a bill of rights might even be dangerous because the enumeration of specific constraints on governmental powers could give rise to the unacceptable inference that any government action not specifically constrained was permitted. *Id.* at 513-514.

correct, it means, perhaps unsurprisingly, that the first amendment does not brutely subordinate all other constitutional values to that of free speech.[297] Instead, the first amendment identifies free speech as a highly important constitutional value that must take its place alongside other important constitutional values. The Court's opinions in the first amendment area reflect such a view, identifying numerous contexts in which free speech must yield to other constitutional imperatives.[298]

Given the somewhat ambiguous or fluid position of free speech in the hierarchy of constitutional values, the situations in which one considers free speech values to outweigh other constitutional considerations, and vice versa, will depend in large part on one's theory of what purposes the first amendment is meant to serve in the constitutional scheme. The self-government theory of the first amendment has a distinctly Lockean ring, and thus holds some attraction even for the weak Lockean. The theory fits in nicely with the notion that the first amendment did not significantly alter the original constitutional scheme; it also suggests the appealingly symmetrical possibility that the first amendment was added to the Constitution in order to reinforce the scheme of Lockean popular sovereignty implemented by the basic constitutional framework.

Weak Lockeanism, however, cautions against embracing an interpretation of the Constitution simply because that interpretation is con-

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This reasoning immediately proved unacceptable to the public. *See* L. LEVY, *supra*, at 112-18. Massachusetts, New Hampshire, Virginia, New York, and North Carolina all transmitted along with their messages of ratification a suggestion that the Constitution be amended to include a bill of rights. *Id.* at 117. When the first Congress passed what became the first ten amendments to the Constitution, their purpose was thus not to alter the structure of the original document, but to correct a serious omission integral to the original plan. *Id.* at 119-34; *see also* Anderson, *The Origins of the Press Clause*, 30 U.C.L.A. L. REV. 455, 476-77 (1983). As Governor John Hancock told the Massachusetts Legislature in presenting the proposed amendments for ratification, "it is the ardent wish of every patriot, that the [constitutional] plan may be as compleat as human wisdom can effect it." 2 B. SCHWARTZ, *supra*, at 1173.

This view of the relation of the Bill of Rights to the Constitution plays an important role in the current debate over the meaning of the ninth amendment. *See, e.g.*, Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1 (1988); *Symposium on Interpreting the Ninth Amendment*, 64 CHI.[-]KENT L. REV. 37 (1988).

297. *See, e.g.*, Dennis v. United States, 341 U.S. 494, 503 (1951) ("the societal value of speech must, on occasion, be subordinated to other values and considerations").

298. *E.g.*, Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) (free speech yields to government interest in maintaining attractive and useful public park); United States Civil Service Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973) (free speech yields to government interest in competent, professional work force); New York Times Co. v. United States, 403 U.S. 713 (1971) (free speech may yield in some circumstances to government interest in national security).

sistent with the popular sovereignty theory. On the contrary, if popular sovereignty means anything to the weak Lockean, it means that the people are free to structure their government in any way they see fit, whether their way is consistent and sensible, or inconsistent and foolish. Thus, while it may be the case that the people adopted the first amendment in order to protect their ability to govern themselves, it is certainly possible that they decided to bar government abridgement of free speech for quite different reasons, including self-fulfillment, the search for truth, or any combination of these and other rationales that have been suggested for the first amendment. As a result, there is no definitive way to determine, without knowing more, where the first amendment places free speech in the hierarchy of constitutional values. From the perspective of weak Lockeanism, this means that there is no interpretational short-cut to deciding whether in any given context the constitutional commitment to free speech outweighs the constitutional commitment to governmental legitimacy.

In spite of this difficulty, the theory of popular sovereignty can assist in analyzing such problems. Lockean theory tells us that there are substantial risks involved in structuring a government in a way that subordinates the requirement of governmental legitimacy to other values, including free speech. It tells us that when a constitutional system, for whatever reason, permits leaders to take power who do not in fact govern with the consent of the governed, the government and all its acts can be illegitimate and therefore not entitled to obedience. The result in extreme cases could be political slavery or anarchy, perhaps accompanied by dangers comparable to those which the people banded into society in order to escape in the first place. While there is nothing to prevent a people from making choices about the structure and power of its government that raise the risks associated with illegitimacy, the magnitude of the risks suggests that we ought not to impute to any people a casual attitude toward the making of such choices. In other words, a people may choose in making their constitution to elevate other values, such as free speech, over the maintenance of strict governmental legitimacy, and may have entirely valid reasons for doing so. Yet we should reach such a constitutional interpretation only after the most penetrating scrutiny because it represents a choice by the people ordinarily to be avoided: the choice to risk erosion of popular sovereignty itself, the very thing that makes government possible at all, in order to pursue some other societal goal.

This reasoning seems especially appropriate with respect to the

United States Constitution. Our nation was founded in the belief that "it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question whether societies of men are really capable or not of establishing good government from reflection and choice."[299] The people of this nation set out deliberately to create for themselves a good and lasting government, and they reflected at considerable length on how best to accomplish that purpose. Accordingly, we should be extremely cautious, if not downright reluctant, to accept interpretations of the Constitution that put the nation at risk due to a subordination of the maintenance of governmental legitimacy to other constitutional values, even values as worthy in their own right as free speech.

It should be clear by now that the application of weak Lockeanism in a particular factual setting requires a complex approach sensitive to nuance. Because the Court has never really dealt with the issues that confront the weak Lockean, such an analysis would have to be conducted almost from scratch, a task impossible here. Consequently, I shall confine myself to attempting briefly to impart some flavor for how a weak Lockean might analyze a particular modern election law such as the exit-poll ban discussed earlier.

For weak Lockeanism the first amendment merely is what it is, regardless of the dictates of political theory or internal constitutional consistency. The weak Lockean therefore must either determine definitively what the first amendment is "about," or, as the Court so frequently does, duck that difficult issue by determining that it makes no difference in this particular case what the first amendment is about because the result is the same under any reasonable interpretation of the amendment. Fortunately, the easy way out is available here.

Consider again three of the major competing theories of the first amendment: the marketplace of ideas, self-fulfillment and self-government. If the first amendment is intended to establish a marketplace of ideas aimed at discovering and testing truth or claims to truth, to what extent does an exit-poll ban conflict with that goal? Exit-polls are the basis for projections of election winners, which are claims about who is going to win an election and by how much. But unlike many claims to truth, which are not susceptible to authoritative adjudication, the claim that a particular person won an election by a particular margin can and will be answered definitively by counting the ballots. Thus, to re-

299. THE FEDERALIST, No. 1, at 33 (A. Hamilton) (C. Rossiter ed. 1961).

strict this one type of media speculation about election results impairs society's ability to determine the true election winner only to a negligible degree, if at all. When this marginal or nonexistent impediment to the goal of the first amendment worked by the exit-poll ban is weighed against the threat to legitimacy posed by the distortion of voting patterns and election results associated with media projections, the weak Lockean is likely to conclude that the general constitutional goal of assuring governmental legitimacy outweighs the first amendment interest in speech in this particular situation. The law is therefore constitutional.

The weak Lockean is likely to reach the same conclusion even if the first amendment is concerned more with self-fulfillment than with the marketplace of ideas. First, to the extent that the impact of an exit-poll ban falls on news organizations and broadcast networks, the first amendment is not implicated at all: Lockean theory states that society's membership is confined to individuals, and if the first amendment exists to allow the self-fulfillment of individual members of society, corporations simply do not qualify for the protection.[300] Second, even if the impact of the ban can be characterized as falling on individual journalists, their fulfillment interests are served only weakly by their ability to make advance projections of election winners. On one hand, if their fulfillment interest lies in telling the world who won the election, that interest can be achieved only a few hours after it first arises by reporting the actual winners based on vote tabulations, or perhaps by making projections based on surveys taken after the polls are closed. On the other hand, if journalists' interests consist precisely in stating who won the election *before* that fact is authoritatively known, their interest begins to look suspiciously like an interest in influencing the results—exactly the harm the exit-poll ban is designed to prevent.[301] It seems doubtful that the fulfillment interests protected by the first

300. A case contrary to this position is First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978), in which the Court decided that the protection of instances of speech was more important than the identity of the speaker. The Court, however, seemed to rely more on a self-government theory of the first amendment than on a self-fulfillment theory in the circumstances of the case. *Id.* at 776-77. *Cf. id.* at 825-28 (Rehnquist, J., dissenting) (corporations have diminished first amendment rights); Pacific Gas & Elec. Co. v. Public Utils. Comm'n, 475 U.S. 1, 32-33 (1986) (Rehnquist, J., dissenting) (corporations have no first amendment interest in freedom of thought and conscience).

301. Journalists, of course, may have other economic interests that arise from being able to advertise their speed and accuracy of reporting election results, and may hope this translates into higher ratings. These interests, however, are not first amendment self-fulfillment interests.

amendment would extend to interference with the interests of all citizens in accurate elections designed to secure legitimate self-government.[302] In either case, the weak Lockean is likely to view these minor inroads on first amendment protections as insufficient to outweigh the risks associated with inaccurate electoral outcomes.

Finally, if the first amendment is designed principally to secure popular self-government, the exit-poll ban is likely to survive scrutiny under weak Lockeanism for the reasons mentioned in conjunction with strong Lockeanism. Thus, the weak Lockean is able to conclude that Washington's exit-poll ban does not violate the first amendment because under any reasonable theory of the amendment's function and purpose, the government interests in banning exit polls either outweighs any countervailing interests in the ability of the media to make advance election projections, or simply does not conflict in any meaningful way with the goals of the first amendment.

2. *Judicial Analysis of Modern Election Laws*

At present, the Court seems to have trapped itself in a mode of analysis that not only holds no place for considerations of governmental legitimacy, but also views such claims as inconsistent with some fundamental aspect of the first amendment. Paradoxically, the Court has at the same time acknowledged that the achievement of self-government is an important goal served by the constitutional protection of free speech.[303] This schizophrenic outlook has led the Court to the ironic pass of employing a constitutional provision aimed at assuring self-government in such a way as to defeat self-government. The Court's approach holds that the protection of speech in the service of popular sovereignty requires the protection of speech that defeats popular sovereignty. The unfortunate consequence is the impairment of the ability of society's agents to identify accurately the objects of popular consent.

Either of the approaches outlined in the previous section would represent a significant improvement over the current state of the

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302. Alternatively, journalists could claim that their interest in self-fulfillment consists in saying what they want whenever they want. This is a weak claim, for the first amendment right to speak for the purposes of self-fulfillment must be subject to some limitation when the speech begins to harm others who will not be similarly fulfilled. Any other reading would render the first amendment a prescription for anarchy. *See* Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 25 (1971) (noting that fulfillment rationale provides no basis for distinguishing speech from any other human activity).

303. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 14-15 (1976) (per curiam).

Court's analysis of modern election laws. Both strong Lockeanism and weak Lockeanism have the advantage of recognizing that the promotion of governmental legitimacy is a substantial government interest, and that this interest is served by laws that enhance the accuracy of electoral outcomes. Even in its weak form, the Lockean theory of popular sovereignty recognizes that the risks associated with illegitimate government are not lightly undertaken by a people deeply concerned with its own safety and freedom.

If conducted in this or some similar way, judicial review of election laws would well serve the goals of popular sovereignty. The Lockean approach allows the people's representatives to keep the reins of government firmly in the people's hands. Furthermore, this approach gives effect to any deliberate, contrary choices of the people to limit the power of their representatives to assure the people's control over their government.

V. CONCLUSION

I have tried to show in this Article that the Constitution reflects or embodies a theory of popular sovereignty that is at bottom Lockean because under it governmental legitimacy depends upon the consent of the governed. This leads inevitably to the conclusion that elections play a direct role in the establishment and maintenance of governmental legitimacy in a republic because elections are the means by which a vital element of popular consent is expressed and implemented. Because elections are necessarily governed by election laws and procedures, those laws and procedures influence the legitimacy of the elected government in proportion to their ability to identify accurately the particular individuals chosen by the people as their agents and to whose rule the people have in fact consented.

Although the Supreme Court has rarely approached election laws with much sensitivity to their role in the constitutional system of Lockean popular sovereignty—a definite shortcoming in its jurisprudence—the Court's early decisions upholding the "Newtonian" variety of election laws are at least consistent with the high regard in which such laws might be expected to be held. However, in its decisions reviewing modern election laws that affect speech or the spending of money used to buy electoral speech, the Court has repeatedly struck down election laws on first amendment grounds. These decisions, which again do not recognize the Lockean implications of the laws under review, not only fail to recognize the weighty governmental interest in

assuring and enhancing governmental legitimacy, but also rely on the first amendment to erect what comes close to a presumption against the constitutionality of such laws; the result is a judicial reading into the Constitution of a bias against the legislative achievement of electoral accuracy and, by implication, against the achievement of a high degree of assurance of governmental legitimacy.

In order to avoid this potentially dangerous result, the Court needs to reexamine its first amendment decisions in cases dealing with laws aimed at enhancing electoral accuracy through the indirect regulation of speech. In so doing, the Court needs to acknowledge at least to some degree the constitutional aspects of popular sovereignty—to recover in its latest constitutional decisions the sensitivity to the fundamental theory of the Constitution it displayed in its earliest constitutional decisions, and to abandon approaches to interpreting the Constitution that fail to acknowledge the nature and purposes of the document itself.